REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

WESTERN DISTRICT.

ALEXANDRIA, OCTOBER, 1839.

SCOTT'S EXECUTRIX *vs.* GORTON'S EXECUTOR.*

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

A. B. *executor* of C. D. cannot contract with A. B., because A. B. executor and A. B. are both one natural person. So the agent of an executrix for the sale of the estate she administers, cannot contract with himself and buy at the sale part of that estate; because the agent of the executrix is seller and buyer, and are both one and the same natural person; there is no mutation of property.

Where the wife is executrix, selling the property of a succession, and her husband acts as her agent in making the sale, and purchases, if there be any mutation of property, it would pass from the wife to the husband and wife, and belong to the community. The law inhibits all contracts between husband and wife.

This is an action by the plaintiff, acting as the executrix of her deceased husband's succession, to recover the sum of

* This case was decided at the last term of this court, and a re-hearing granted.

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six hundred and five dollars, being the difference in loss between the first and second adjudications of a negro woman and her child, sold at probate sale, and adjudicated to George Gorton, as the highest and last bidder.

The probate sale of the slaves in question, was made under a decree of the Probate Court, provoked by one of the heirs, in a suit against the *widow and heirs* of Thomas C. Scott, deceased. The decree is as follows: "It is ordered that a partition take place as prayed for; and it appearing from the report of experts that the property of said succession cannot be divided in kind without injury to the heirs; and moreover, that a sale is absolutely *necessary for the payment of debts*; it is further ordered and decreed, that the proceedings of the family meeting which have been had, be confirmed, and that the parish judge, acting as auctioneer, proceed to sell the property of the succession of T. C. Scott, deceased; and that a final partition take place between the said *widow* and heirs; and that the *debts of said succession be paid*, &c."

The widow was owner, as partner in community, of half of the estate left by the deceased, after payment of the debts. She was also executrix, and administered the estate, with the agency of her second husband. At the sale which took place in obedience to the above decree of the Court of Probates, George Gorton became the purchaser of a negro woman, named Nancy, and her child, for the price of one thousand one hundred and sixty-five dollars. On examining the woman, and after the sale had closed, Gorton refused to comply with his bid, on account of supposed redhibitory defects and vices, which he averred were known to the seller, and not made known to the bidders.

These slaves, after this refusal, were re-advertised and sold on account of Gorton, and J. K. Elgee, the husband and agent of the executrix, purchased them in, for the price of five hundred and sixty dollars, leaving a difference against Gorton between the first and last sale of six hundred and five dollars, for the recovery of which this suit was brought.

The defendant, Gorton, pleaded a general denial; and

averred that the slaves in question, or the woman, was subject to redhibitory defects and vices, at the time of sale, within the knowledge of the plaintiff, which she was bound to declare. That the suppression of these facts was a cause of nullity, and also subjected the seller to damages. He prays that the suit be dismissed; but if the defects and vices are not so great as he believes, that a deduction be made in the price in proportion to the defects.

There was testimony taken on both sides under this issue; but the case has turned in this court entirely on the right and capacity of the plaintiff, or executrix, to purchase by her agent, at a sale made of the property of an estate she administered; the evidence in relation to the redhibitory vices, set up in the answer is, therefore, not noticed.

There was a verdict and judgment for the plaintiff; and Gorton having died, his executor appealed.

Elgee, for the plaintiff, insisted on the affirmance of the judgment. It was fully supported by the evidence.

Hyams, for the defendant, contended, that the plaintiff could not recover, because, she being the executrix, could not buy at her own sale, either by herself or agent. He could not buy an article he was employed to sell. That, in fact, there was no re-sale of the property. *Beall* vs. *McKernion*, 6 *Louisiana Reports*, 407. 18 *Duranton*, 216. 4 *Martin, N. S.* 267.

2. The husband of the plaintiff could not purchase for her, because it would be a purchase for the community. *Louisiana Code*, 2371.

3. The law forbids, on pain of nullity, the executrix to purchase property administered by her. *Louisiana Code*, 1042, 1139, 1784. 9 *Louisiana Reports*, 48, 351.

4. So strict is the law, that even a partnership cannot purchase, where the *representative* of the estate to be sold, is one of the partners. 11 *Martin*, 297. 8 *Martin, N. S.* 165.

Elgee, in reply, urged that the prohibition to purchase at sales of estates administered by them, did not extend or

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apply to executors. It only embraced administrators, curators, &c. : and the reason was, they were not generally heirs, but strangers. The executrix, in this case, is the widow in community, and is entitled to half the proceeds of the estate in her own right. Surely she should be allowed to purchase in any favorite slave she might want. Heirs are permitted to purchase in sales to effect a partition or otherwise.

2. The widow is allowed to bid in property at the estimative price in the inventory, and she takes it by a good title, and becomes responsible for the price to the other heirs.

Martin, J., delivered the opinion of the court.

In this case the defendant, executor of Gorton, is appellant from a judgment which condemns him to pay a certain sum, as the difference between two adjudications of property, which he bid off at the first sale of the succession of the late Judge Scott.

The facts of the case show that the defendant's testator became the last and highest bidder of two slaves, at the probate sale of said succession, and refused to comply with the terms thereof. The slaves were put up a second time, and adjudicated to the husband and agent of the executrix, for a less sum than the price for which they were bid off at the first adjudication, and the present suit is instituted to recover the difference, under the 2589th article of the Louisiana Code.

A recovery has been resisted on several grounds, the principal one of which is that the re-sale produced no mutation of property, the purchaser being the agent of the seller. In all contracts there must be at least two parties, the *aggregatio mentium* of two natural persons. A. B. executor of C. D. cannot contract with A. B., because A. B. executor, and A. B., are both one natural person. So, the agent of the executrix, for the sale of the property of the estate, could not contract with himself, and purchase part of that estate; because the agent of the executrix, the seller, and the purchaser, are both one and the same natural person. *Beall* vs. *McKernion*, 6 *Louisiana Reports*, 407.

Secondly, there was no mutation of property, because the law inhibits all contracts between husband and wife. *Louisiana Code, article* 1784. The present case offers no exception to this principle. If by the sale there was any mutation of property, it passed from the wife to the husband and wife. The community of acquests and gains is always presumed, and when it exists, the property acquired by either husband or wife, is common to both. If, therefore, the purchaser acquired property to the slaves, they became common to him and the seller. The wife having the administration of the property of the succession, was disabled by law from purchasing any part of it. *Article* 1784.

We have not inquired whether the law be different in a case in which no community of property exists, because this is not suggested in the present case, and the community exists whenever it is not excluded. For these reasons we conclude that the re-sale wrought no mutation of property.

This conclusion renders it unnecessary to examine any of the other questions raised in the defence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that ours be for defendant, with costs in both courts.

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ON A REHEARING.

Executors as well as curators, tutors and other mandatories, are prohibited from purchasing part of the succession administered by them on pain of nullity, at a sale of property to pay the debts of the succession.

The nullity resulting from a prohibited sale to executors of property of the succession administered by them, *is absolute*. No subsequent ratification can give it effect against third persons, interested, who are not parties to the ratification.

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The ratification of an absolute nullity, can have no retroactive effect, but is a new title; and cannot prejudice the rights of third parties previously acquired, whilst a relative nullity relates to the original act.

In this case a rehearing was applied for and obtained.

Elgee, for the plaintiff, argued against the first decision pronounced by the court, and submitted the following points:

1. Purchases at the sale of an estate, by the administrator or curator of the same, are not *absolutely null* and *void* in themselves; the furthest that courts have ever gone, or, perhaps, *can go*, is to pronounce them *voidable*, and this, only when injury be complained of by the heirs or creditors. There is, indeed, no law that I can find, which prohibits *executors* from purchasing. Article 1139, Civil Code, is exclusively confined to curators of vacant successions, or of absent heirs. And article 1784, Civil Code, which is relied upon by the court, only pronounces the incapacity of an administrator to purchase, as a *relative*, not an absolute one. Thus, although an auctioneer is prohibited by positive laws, (and with great force and justice too,) from adjudicating property to himself, at his own sale, yet this court decided, in the case of Scott *vs.* Calvit *et al.*, 2 Louisiana Reports, 69, that it was only a *relative nullity*, which could be taken advantage of, by the heirs or creditors; in case they showed themselves aggrieved. In the absence, therefore, of all *absolute* prohibitory laws, this court will surely infer none. On the doctrine of absolute and relative nullities, I refer the court to 4 *Toullier*, *No.* 553. *Dunod*, *Traité de Prescriptions*, *part* 1, *chapter* 8, *page* 47. *Merlin's Repertoire*, *verbo Nullité*, *sections* 2 *and* 3.

2. Gorton cannot take any advantage of the relative nullity of the purchase made by the agent of the executrix, at the second sale, if, indeed, there be any, which is by no means admitted, unless he were an heir or creditor of Scott's estate, neither of which is pretended; and *then* only in case he could show an injury.

So far from this being the case, it can be seen at once,

that Gorton was *benefited*, absolutely, by the purchase having been made by agent, he being the *last* and *highest* bidder. Will this court then permit Gorton to come into court, and shield himself from paying a just debt, by contending that he would have been bound, had the property been adjudicated to A. B., who only offered five hundred dollars for it, but that he will not pay; or the property being adjudged to C. D. for six hundred dollars, because, *perhaps*, the sale to C. D. may be voidable, although the adjudication to C. D. be a *positive advantage* of one hundred dollars to Gorton.

3. The sale of the property of Scott's estate, of which the negroes, which were adjudicated to the agent of the executrix, formed a part, was not a sale, made by the authority, or at the request of the executrix; on the contrary, the decree clearly shows that it was a *licitation* made at the instance of a *co-heir to effect a partition between the widow in community*, (the present plaintiff,) *and the heirs*.

The *time*, the *place*, the *mode*, and the *terms* of the sale, were prescribed by a *family meeting*, without any intervention whatsoever of the executrix, who was also the widow in community. The *rationale* of the laws then, which prohibits an administration from purchasing at the sale of the effects of the estate which he administers on, cannot apply here, which I take to be, that it is to prevent any loss or injury to the estate by the administrator's having the control of the manner, time, place, and terms of the sale. The sale in this case was made contradictorily with the co-heirs and co-proprietors.

4. In all suits for a partition, where a sale takes place, nothing in the laws prohibits co-proprietors from purchasing at the sale, although, as is almost universally the case, the sale be provoked by one of them. On the contrary, we find that by articles 1265 and 2603 of the Civil Code, heirs may purchase at the sale of the hereditary effects, to the amount of their shares, if they choose; and even this privilege is, with certain restrictions, extended to minor co-heirs, by article 1266 of the Civil Code.

5. A wise, beneficent, and most just provision of law, has

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declared that the *heir* shall have the *preference* over all others in an administration of an estate. See Louisiana Code, article 1035. The policy of the law giver is evident. He justly presumes, that he who has the highest interests in an estate, will take the best care of it. Shall it then be said, that whilst the law *invites* the *heir* to administer, and holds out the offer of it to him, as a special favor, and as his peculiar privilege, will yet, at the same time, if he does accept it, take from him the high privilege which, by article 2420, is extended to all persons, to buy and sell what they think proper, unless *specially interdicted;* and moreover *nullify* the absolute provisions of the 1265th and 2603d articles of the Code, which expressly grants him the privilege of purchasing? How much stronger is the case before the court.

The plaintiff was the widow in community of the late T. C. Scott, possessing in her own right absolutely *one half* of the estate; her husband, by his will, makes her his executrix, an office which the courts may well presume is only bestowed upon those in whom the testator places the highest confidence. Will this court then say, "it is true you have the best, nay, the highest rights, to the management of this estate. You already are owner of one-half, and, therefore, we may justly presume that self interest will prompt you to take the best care of the balance; yet, if you do accept it, you must, and will forfeit all those rights, which the law has given to heirs and co-proprietors, to purchase the portion of that property which you already are the owner of one-half of." What more natural thing is it, than for a husband to make his wife his executrix, or for the wife to make her husband her executor; and yet, if they do accept the office, will this court impose disabilities upon them, which the law giver certainly has not? It may happen that I am partner in community with a deceased wife, whose executor I also am. An heir of my wife's, provokes a sale of the community property. It is indivisible by nature; I am compelled to consent. There exists amongst the property to be sold, some faithful and valuable slaves, which I have a peculiar wish to obtain. They are offered for sale. Not one-half is

bid for them that I would be willing to give, yet, according to the decision of this court, I must quietly stand by, with folded arms, and see my own property sacrificed; my house and my domestics pass away into strangers' hands, because my wife has unfortunately made me the victim of her confidence, by naming me as her executor. I cannot, (no matter at how low a sum the property be offered,) even *bid* for it, since he who has not the capacity to purchase, cannot legally make an offer.

6. The decision of the court appears to be based upon the grounds, that the executrix is the *seller*; that, therefore, if she buy, there is not that *aggregatio mentium*, which is essential to a contract of sale. I contend that, in this case, the executrix was not the vendor, at least solely and entirely. The record, page 14, as I have before stated, shows that the *price* to be given, the *thing* to be sold, and the *terms* and *conditions* upon which the same should be offered, were *decided* upon and ordered by a *family meeting*, at the provocation of one of the co-heirs. The question then arises, who is to be considered the seller? I answer, that the partner in community and the heirs, being joint owners of the whole, were, and alone could be properly considered as the vendors, through the medium of their agent, or intermediary, the court. Let us suppose an estate, on which no person has administered, the effects of which are the common property of the heirs. One of the co-heirs forces a sale, to effect a partition. Which of the heirs is the seller? If there be one on whom that character will rest, he cannot buy, according to the decision of the court, whilst there is positive law to the contrary.

7. Does the addition of the duties of an executor impair the legal rights of the co-heir or co-proprietor to purchase at the sale of the estate? Assuredly not. Let us see what are those duties. We find by article 1653, that they are purely conservatory and ministerial. "He is bound to see the provisions of the testament faithfully executed;" beyond this, his powers do not extend. There is, then, nothing here to prohibit him from purchasing at an open sale of the testa-

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tor's property; more especially if that property be held in common between them. The similitude between the duties of an executor, and those of an administrator, can be no further extended than they are by articles 1139 and 1663. In the absence, then, of all absolute prohibitory statutes, this court will surely not deprive the citizen of one of his highest privileges, by abstract deductions. Again, it has been the settled and well-established practice here, for the last twenty years, for partners in community, to purchase at the sale of the common property, although, as is almost always the case, the survivor be the administrator of the deceased. Hundreds of thousands of dollars worth of property has been bought and sold in this way; and even in the case before the court, the title to a large and valuable property is endangered by its decision. *Expedit Reipublicæ ut sit finis litium.* Should, however, the court still, in this case, maintain their original opinion, the door is thrown open wide for endless litigation. Upon the whole, I take it to be, that if the purchase made by the agent be null, as being the husband of the executrix, and partner in community, it can only be relatively so; and if so, that none but heirs, or creditors who are aggrieved, could take advantage of it; that Gorton is not in either of these predicaments; and if he were, the adjudication to her husband, so far from working an injury, was, on the contrary, fraught with a *positive* and *direct benefit* to him, as, by his giving the *last* and *highest price* for the negroes, at the second sale, it lessened the amount which Gorton was responsible for under the 2589th article of the Code.

8. I take it, that, from a fair interpretation of article 1669, the functions of an executor, as such, cease upon the heirs coming in and taking possession of the estate, which was the case in Scott's estate, as may be inferred from the proceedings.

From the foregoing, the following corollaries may be deduced:

1st. The rules applicable to the government, and those establishing the rights, duties, and responsibilities of an

executor, are only the same with those of a curator of a vacant succession of an administrator, so far as identified by the Louisiana Code, articles 1139 and 1663; *inclusio unius est exclusio alterius.*

2d. All persons are capable of contracting, except those specially excepted by law. *Idem.*, 1775.

3d. An executor is not inhibited by law from purchasing property at a public sale of the estate of which he is executor.

4th. Courts are not at liberty to create incapacities even by analogies.

5th. If the sale was null, it was only a *relative* one. *Idem.*, 1784, 1788.

6th. Acts in contravention of mere prohibitory laws, are *relative nullities, not void*, but *voidable.*

7th. Such acts can only be attacked by the parties to them.

8th. Before a court can pronounce an act an absolute nullity, it is necessary, not only that the law should prohibit it, but declare it absolutely null.

9th. Where a partition is provoked by a co-heir, by means of a judicial proceeding or licitation, the court is the intermediate agent and seller.

10th. A licitation is not a sale, but a mode of partition, one of the effects of the action *communi dividendo*; it is, in a word, the complement of partition. See *Merlin verbo Licitation. Pothier, Contrat de Vente, Nos.* 630, 637, 638.

All of which is respectfully submitted.

Hyams, argued in reply, on behalf of the defendant.

Strawbridge, J., delivered the opinion of the court.

At a former term, this cause having been heard, and judgment rendered for the defendant, a rehearing was granted, and it has again been argued before us.

Gorton, the defendant, having purchased a female slave and child at a probate sale of a succession administered by the plaintiff, refused to carry into effect the adjudication, on the ground of some supposed or real redhibitory vice.

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A second sale was made at the risk of the first purchaser, at which the slave was struck off to the plaintiff for a smaller price, and this suit was brought to recover the difference between the two sales, (some six or seven hundred dollars,) with damages.

The former judgment of this court was adverse to these claims, for the reason that the second sale was void, the executrix being incapable of purchasing.

The rehearing was granted on the allegation that the sale was made in a suit in partition, provoked by some of the heirs, the present plaintiff, one of the co-proprietors being a defendant therein, and capable of purchasing at a sale made with a view to partition.

Had this view of the case been supported by the testimony, it is not perceived how we could have refused to alter the former decree, but an examination of the record shows conclusively that the sale was made as well to pay debts of the succession as for the purpose of partition. Such is the statement in the order of sale, (the petition not making part of the evidence.) There is, also, a further order not referred to in argument, made in three suits against the succession, wherein it is stated, that, "for the purpose of meeting the pressing exigencies of the estate, the sale shall be made for a part cash in hand."

The petition further states that "the plaintiff specially brings this suit as executrix of the succession."

Executors as well as curators, tutors and other mandatories, are prohibited from purchasing part of the succession administered by them on pain of nullity, at a sale of property to pay the debts of the succession.

The case is, therefore, presented, of an executrix purchasing a part of the succession under her administration, and is a nullity; for we think that the reason of the rule applies as well to executors as to curators, tutors and other mandatories. Article 1139, of the Louisiana Code, prohibits "curators from making such purchases by himself, or by means of a third person, under pain of nullity," &c. And article 1663, provides that "the executor shall proceed to the sale, in the same manner as curators of vacant successions." Article 1784, we also think under the class of "administrators," includes executors.

The plaintiff, however, contends that the nullity is not

absolute, but relative, and cannot be invoked by others than those in whose favor such nullity is pronounced, and to prove this, he argues that the sale might be ratified by the heirs and creditors for whose benefit alone it has been pronounced.

The test, we think, is not a correct one, as certain absolute nullities may be ratified by those interested. See 7 *Toullier, No.* 561. Indeed, it is difficult to understand how any nullity, on whatever considerations founded, may not be acquiesced in by those interested. But we can understand, that though they may choose to act as if it were valid, yet, if it be an absolute nullity, then ratification cannot bind others.

The nullity resulting from a prohibited sale to executors of property of the succession administered by them, *is absolute.* No subsequent ratification can give it effect against third persons, interested, who are not parties to the ratification.

The same author, in No. 558, tells us, that the absolute nullity may be distinguished from the relative, easily :

"Toute disposition qui déclare positivement et sans restriction la nullité d'un acte, autrement la simple déclaration de nullité, quel qu'ait été le motif du législateur, soit pour cause d'intérêt public, soit pour l'intérêt des particuliers, soit pour vice de forme opère une nullité absolue, par cela même qu'elle n'est pas limitée à certaines personnes.

"Elle peut donc être invoquée non seulement par chacune des parties contractantes, par leurs héritiers ou ayant-cause, mais encore par toute personne intéressée à ne pas reconnaître l'acte nul."

The ratification of an absolute nullity, can have no retroactive effect, but is a new title, and cannot prejudice the rights of third parties previously acquired, whilst a relative nullity relates to the original act.

If this definition be correct, the nullity pronounced by article 1139, prohibiting purchases by a curator, and pronouncing a simple declaration of nullity, is an absolute nullity, which, though it should be agreed to be merely for the interest of individuals, and so might be ratified as regards them, is still to be used to a certain extent by others, for the same author, in Nos. 563 and 564, distinguishes between the ratification of absolute nullities, declared for the interest of individuals, and of relative nullities, and says the former can have no retroactive effect, but is a new title, and cannot prejudice rights of third persons previously acquired, whilst the latter relates to the original act. The subject is one of difficulty, and we treat it with great diffidence.

That the defendant, for whose account and risk the second sale was made, had an interest that such sale should be

legally made, and to the best advantage, is scarcely to be doubted; that the party making such sale was bound to see the sale so conducted, is equally clear. The argument that he became purchaser, by bidding higher than any other, and thus did him a benefit, is unsound. "When to prevent fraud, or from any other motives of public good, the law declares certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has not been proved fraudulent," &c. The provision in question is not only for the protection of individual interest, but to maintain public order and morality. "Lead us not into temptation" is its basis. It boots not that the tutor of a minor, or the administrator of a succession, is the highest bidder, for, to be a purchaser, he must always be this. It would avail nothing, though he paid double the acknowledged value. His purchase is against public order; it is prohibited, it is pronounced a nullity, and all persons interested may oppose it. And although those for whose interests the legislature may have also had regard, may hereafter ratify it, they cannot deprive others of the right of opposition acquired before such ratification.

For these considerations, it is ordered, that the former judgment of this court remain unchanged.

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CONSOLIDATED CASES.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE SEVENTH PRESIDING.

An attaching creditor may at the same time proceed by personal citation against his debtor.

The first of these cases is a redhibitory action, in which the plaintiff, Gibson, alleges he purchased from the defend-

* These cases were decided at the October term, 1838, and a rehearing granted.

ant, Huie, who styles himself, in the act of sale, a resident of North Carolina, four slaves, at different prices, for the aggregate sum of two thousand four hundred and fifty dollars. That said slaves were afflicted, at the time of sale, with redhibitory maladies, then unknown to him, which are ascertained to be incurable, and have rendered the slaves entirely useless and a dead expense, so much so, that had he been apprised of their defects and vices, he would never have purchased them. He prays judgment for the return of the price, and seven hundred dollars in damages, for medical attendance, and other expenses, &c.

The plaintiff further alleges, that the defendant resides permanently out of the state, to wit, in North Carolina, but has debts, effects and credits in this state, within the jurisdiction of the court, in the hands of J. L. Crain and R. A. Hunter, which he prays may be attached.

The sheriff returned, that he attached in the hands of J. L. Crain and R. A. Hunter, all the right and interest of James Huie, the defendant, to a certain promissory note, drawn by Hunter and Crain, and endorsed by R. A. Crain, for four thousand dollars, dated the 10th December, 1833, payable the 1st March, 1835, and gave them due notice of the seizure, Crain acknowledging that said note was not yet due.

A copy of the petition, and a citation, was sent to New-Orleans, where the defendant, Huie, then was. On the 6th of April, 1835, the sheriff of the parish of New-Orleans returned, that "he served a copy of the petition and citation on James Huie in person."

At the April term, 1835, the defendant, Huie, appeared by counsel, and filed an exception, averring that the suit was improperly brought, and that he ought to be sued in the parish of New-Orleans, the place of his domicil. He also put in an answer to the merits, pleading the general issue, admitting his endorsement in blank on the back of the note attached, but averring that the court had no jurisdiction by attachment, as the note attached was transferred and assigned by him to one James B. Diggs, before the service and notice of the attachment which he would show on the trial.

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The garnishees, Hunter, Crain and others, aver that the note attached was transferred by endorsement to the defendant, Huie, of which they had notice, but were not notified of the transfer from Huie to Diggs, or any other person, until after they were cited as garnishees in this attachment. They also aver that they have been sued on the note by Diggs; that they are ready to pay whenever it shall be determined to whom; but that, in the mean time, they are not liable to pay interest on said note. They pray that these suits be consolidated, &c.

Diggs, as the endorsee and holder of the note thus attached, instituted suit against the maker and endorsers. It was endorsed in blank by R. A. Crain, the payee, and by Gibson and Huie.

The defendants set up for defence to this action that they had been sued in attachment on the same note as garnishees, and referred to the suit of Gibson against Huie.

On the trial, Huie offered in evidence his declaration before the parish judge of New-Orleans, changing his domicil from North Carolina to this parish, dated the 26th March, 1835, and a day or two before service on him of the petition and citation in this suit.

Gibson made proof of the sale to him of the slaves mentioned in the petition, and offered evidence of the redhibitory vices and defects complained of, all of which was submitted to a jury.

Diggs made proof of his title to the note in question, and the makers and endorsers admitted their signatures.

The jury returned a verdict for Gibson against Huie, of three thousand one hundred and fifty dollars, the amount claimed in the petition; and for Diggs, against the makers and endorsers of the note, the amount thereof; and from judgment confirming these verdicts, Huie, and Crain, and Hunter appealed.

Dunbar and *Winn*, for the plaintiff, Gibson.

Barry, for the defendant, Huie.

Hyams, for Huie and Diggs, contended, that the judgment

in favor of Diggs must be confirmed, as he was the endorsee for full value before the maturity of the note, and without notice; and, as against him no equity between the original parties could be inquired into. 2 *Starkie*, 171. 3 *Louisiana Reports*, 239.

2. The endorsement of the note is *prima facie* evidence of full value, and it was incumbent, at any rate, on the defendants, to show the contrary. The note was transferred by Huie before maturity, and its being protested, Diggs brought suit. The jury gave a verdict for the amount which should be sustained.

3. The judgment of Gibson against Huie ought to be reversed. He had parted with his interest in the note at the time of the attachment, and, consequently, the court was without jurisdiction; neither had they jurisdiction of his person. The exception to the jurisdiction of the District Court of Rapides should have been sustained. Huie was in New-Orleans, and, personally, was beyond the jurisdiction of the District Court of Rapides, whether he was a resident of the parish of New-Orleans, or a citizen of North Carolina. He was, therefore, not before the court, either by attachment or by personal citation. See *Code of Practice, articles* 129, 162-3-4-5 and 6, and No. 6 of 165. 8 *Martin, N. S.* 250. 3 *Louisiana Reports*, 127.

4. On the merits, the evidence does not show that all the slaves died of redhibitory defects. Two of them were sick, and died of diseases evidently contracted after the sale. They had diarrhœa and a disease of the lungs; were taken sick after the sale, and on receiving medical attendance, became convalescent, and died some six or seven weeks afterwards, of a relapse. Their price was one thousand one hundred and twenty-five dollars. This should be deducted. There is only two hundred and fifty-five dollars of medical expense proved, when seven hundred dollars has been claimed and allowed.

Bullard, J., delivered the opinion of the court.

These two cases were consolidated in the court below, and

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tried together. In the first, the plaintiff seeks to recover back from his vendor, Huie, the price of certain slaves, on the grounds of redhibitory maladies; and, alleging that the defendant was a resident of North Carolina, attached a certain promissory note in the hands of the makers and endorsers, before its maturity; and, also, proceeded by personal citation. In the second, Diggs as endorsee of the promissory note attached, sues the makers and endorsers. There was a verdict and judgment for the plaintiffs in both cases, without regard to the attachment, and Huie and the makers and endorsers, prosecute the present appeal.

An attaching creditor may, at the same time, proceed by personal citation against his debtor.

It is well settled, that the attaching creditor may, at the same time, proceed by personal citation against his debtor, and the view we have taken of this case, independently of the attachment, makes it unnecessary to examine other questions relating to it, and particularly the charge of the judge.

A citation was issued and served on the defendant. He appeared by attorney, and excepted to the action on the ground that he was a citizen of New-Orleans, and ought to be sued in the place of his domicil. This exception was, in our opinion, properly overruled, because the defendant did not show that he had a domicil in the state. In the act of sale of the slaves, he calls himself a citizen of North Carolina, and his declaration before the parish judge of the parish of Orleans, the day previous to the service, does not suffice to show that he had a domicil there. He then put in an answer to the merits.

The question of the existence of redhibitory defects at the time of the sale, was left to the jury, and nothing in the record satisfies us that it is our duty to disturb the verdict. The evidence in the second case appears to be sufficient to justify the verdict and judgment against the defendants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

GIBSON *vs.* HUIE, AND DIGGS *vs.* HUNTER ET AL. CONSOLIDATED CASES.

ON A REHEARING.

Where the defendant is found, or resides within the state, he cannot be cited to appear in a different jurisdiction, from that in which he may be at the time of bringing suit. In such a case one district court has no power to issue process to be served within the jurisdiction of another and a different court.

A debtor, having no residence or fixed domicil in the state, may be sued wherever he is found; but suit must be brought in the court having jurisdiction over the place where he is found.

Where a defendant *avers* that a certain note, held by him, and attached in the hands of the makers, was transferred by him before service and notice of the attachment, and fails to show this, it will be taken for granted he was still in possession.

If a promissory note be attached in the hands of the makers before it is due, the holder and defendant cannot defeat the attachment by transferring the note, after notice to the garnishees.

Attachments of negotiable paper in the hands of the makers, does not restrain its negotiability, provided the transfer be made before maturity and without notice of the existing attachment to innocent purchasers.

A prayer by the appellee to amend the judgment in his favor, comes too late, when only filed on the day of argument.

A rehearing in this cause having been granted, it now came up for a second trial.

Hyams, for the defendant, Huie, asked and obtained a rehearing on the following grounds:

1st. That he had no interest in the note attached, as was fully shown on the trial in the court below, sustained by the verdict of the jury, showing the same to have belonged to Diggs, and which verdict has been also sustained by the Supreme Court, from which it follows, that, as he had no property within the jurisdiction of the District Court for the

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parish of Rapides, the attachment should have been dissolved, and there could only have been a personal action against him. See cases decided by this court. *Schlater vs. Broaddus*, 3 *Martin, N. S.* 321. *Woodward vs. Brainard*, 6 *Martin*, 573. *Astor vs. Winter*, 8 *Martin*, 203, 205.

2d. If there was no property attached, and the attachment, therefore, fell, the court was without jurisdiction, unless the District Court of the parish of Rapides had the power to cite personally before it, in personal actions, persons residing in another parish of the state, which this court has expressly decided in the negative, in two of its decisions. See *Evans vs. Saul and Wife*, 8 *Martin, N. S.*, 250. *Thomas vs. Dixon*, 3 *Louisiana Reports*, 125, and the articles of the Code of Practice cited therein. Whether Huie, at the time of the service of citation upon him in New-Orleans, was domiciled in New-Orleans, or a citizen of North Carolina, is a matter of indifference, the court of another jurisdiction than that of Orleans, had no power to cite him before it in a personal action. He was in New-Orleans at the time citation from the parish of Rapides was served upon him. And as a citizen of North Carolina, or a resident of New-Orleans, it was only the courts of the latter that could cite him before them in a personal action. See Code of Practice, article 162, and No. 6 of article 165. One must be sued in his own domicil or residence. Foreigners, or those who have no known or fixed residence may be cited wherever they are found. In the case of Evans *vs.* Saul, above mentioned, this court decided, that where a party residing in the parish of St. Landry, had departed from the state, the court of that parish could attach property within its jurisdiction, but that the court had no jurisdiction to send process into another parish to cite him personally.

Morphy, J., delivered the opinion of the court.

These cases were consolidated by an order of the court below, and tried together before the same jury. In the first, the plaintiff seeks to recover back from his vendor, Huie, the price of certain slaves, on the ground of redhibitory

maladies; and, on an allegation that the defendant was a resident of North Carolina, attached a certain promissory note, in the hands of the makers, before its maturity; he also proceeded by personal citation, which was served on defendant in the city of New-Orleans. Huie appeared by attorney, and excepted to the action, on the ground that he was a citizen of New-Orleans, and that he ought to be sued in the place of his domicil. This exception being overruled, defendant then put in an answer to the merits, in which, after a general denial, he avers that he was not brought into court by the writ of attachment, because nothing had been attached, the note having been transferred and assigned by him to one Diggs, *before* the service of the attachment, as he would show on the trial of the cause. In the second suit, Diggs, as holder of the promissory note attached, sues the makers and endorsers. There was a verdict and judgment for the plaintiffs, in both suits, without regard to the attachment, and Huie and the makers and endorsers, prosecute the present appeal.

It appears to us that Huie's exception was improperly overruled, not on account of the grounds assumed by him, (for he did not show that he had a domicil in the state,) but because, in our opinion, the court below, in a case like the present, had no power to issue process of citation to be served in New-Orleans. *Code of Practice*, 129. The counsel for the plaintiff has called our attention to the 6th paragraph of article 165 of the Code of Practice, as supporting the course pursued. It provides that "when the defendants are foreigners, or have no fixed or known place of residence in the state, they may be cited wherever they are found." We understand this provision as giving the creditor the right of bringing his debtor into the courts holding jurisdiction over the place where he may be found, but not as authorizing the process of the courts of one district to be executed in other districts over which they have no jurisdiction.

We must next inquire whether Huie was brought into court under the writ of attachment. This depends on the fact of his ownership of the note attached at the time of

Where the defendant is found, or resides within the state, he cannot be cited to appear in a different jurisdiction, from that in which he may be at the time of bringing suit. In such a case one district court has no power to issue process to be served within the jurisdiction of another and different court.

A debtor, having no residence or fixed domicil in the state, may be sued wherever he is found; but suit must be brought in the court having jurisdiction over the place where he is found.

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Where a defendant *avers* that a certain note, held by him and attached in the hands of the makers, was transferred by him before service and notice of the attachment, and fails to show this, it will be taken for granted he was still in possession.

If a promissory note be attached in the hands of the makers before it is due, the holder and defendant cannot defeat the attachment by transferring the note after notice tothe garnishees.

Attachments of negotiable paper in the hands of the makers, does not restrain its negotiability, provided the transfer be made before maturity, and without notice of the existing attachment to innocent purchasers.

A prayer by the appellee to amend the judgment in his favor, comes too late when only filed on the day of argument.

the service of the attachment. By his averments, in his answer, he has assumed the burthen of proving that he had parted with the note, before service on the garnishees. Having failed to make any such proof, we must take it for granted that he was yet in possession of the note, and that, therefore, he was properly brought into court. Jurisdiction being once vested, he could not defeat or destroy it by negotiating and transferring the note. To permit him to do so, would be permitting him to take advantage of his own wrong. Great stress was laid, in the argument, on the time of the transfer of the note to Diggs, but only in relation to its effect on the attachment, in bringing Huie into court. As to him, the attachment must be maintained, and produce all its legal effects; but it surely could not impede the subsequent transfer of the note to an innocent purchaser. Attachments of negotiable paper, in the hands of the makers, cannot restrain its negotiability, provided the transfer be made before maturity, and without notice of the existing attachments. Nothing in the evidence raises the slightest suspicion that Diggs had any knowledge of the attachment, and the pleadings do not question his right to the note, nor call on him to prove the consideration he gave. From the view we have taken of the case, we do not deem it necessary to notice the bill of exceptions taken to the charge of the judge below. Gibson has not appealed from the judgment, and his prayer that it should be amended so as to give him judgment against the garnishees, cannot be considered, because it came too late, having been filed only on the day of the argument. *Code of Practice*, 890.

On the merits, the question of the existence of redhibitory defects at the time of the sale was left to the jury, and nothing in the record satisfies us that it is our duty to disturb the verdict. The evidence in the second cause appears to be sufficient to justify the verdict and judgment against the defendants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MOSS *vs.* COLLIER.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

Where the vendor's act of sale and mortgage contains the clause *de non alienando*, there is no oath required, or notice to the third person, in proceeding against the mortgaged property by the *via executiva*, or executory proceedings.

If the petition pursues the forms, and prays for an order of seizure and sale, the fact of the clerk issuing a citation to the defendant, will not change the suit into the *via ordinaria*.

This is a proceeding by the executory process, against mortgaged property in the hands of a third possessor. The act of mortgage was taken on certain property, to secure the payment of a note of four thousand and eighty-nine dollars and sixty-eight cents, drawn by W. Byrnes, the 1st July, 1837, payable at the Union Bank of New-Orleans, the 15th March, 1838. The act contained the *pact de non alienando*.

The note is paraphed by the notary the 1st July, 1837, and a duly certified copy of the act of mortgage annexed to the petition. It alleges that payment of the note had been in vain demanded of W. Byrnes, the maker, more than thirty days; and that notice of ten days had been given to the defendant, Collier, to whom the property had been sold and transferred, before instituting these proceedings. The petitioner prays for an order of seizure and sale.

There was also an affidavit by the plaintiff's attorney, taken before the clerk of the court, annexed to the petition, setting forth the demands made on the debtor, and notice to the defendant. The certificate of the parish judge of Concordia, is dated the 17th June, 1839, and states that the mortgage taken to secure the payment of this note "has been duly recorded in his office."

An order of seizure issued, and the defendant appealed therefrom, directly, to this court.

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Dunlap and *Dunbar*, for the appellant, assigned for error that the affidavit was insufficient, being sworn to before the clerk, and, consequently, there is no evidence of the thirty days previous demand on the debtor, and ten days notice to the third possessor, as is required by law.

2. The proceedings in this case commenced in the *via ordinaria*, as citation was issued; and could not be changed to the *via executiva*.

Hyams, for the same side, contended, that there was no evidence showing that the plaintiff's mortgage was recorded before the sale and transfer from Byrnes to Collier, the defendant. The mortgage is dated in July, 1837, and the certificate of the parish judge, stating that it was duly recorded in his office, is dated the 27th June, 1839. Before this date the property was transferred, and it must be presumed the transfer was before the recording, as no other date but that of the certificate is given.

2. It is objected, that this was not assigned for error. This was not necessary, where the record enables the court to act on the merits of the case. The court's attention may be drawn by either party to an error of the inferior judge, without any being specially assigned. See 5 *Martin, N. S.*, 340. 2 *Louisiana Reports*, 347; and, also, 9 *Martin*, 275, where the court say: "Want of evidence to support a judgment, cannot be assigned as error apparent on the record."

3. In relation to the *pact de non alienando*, if the act of mortgage itself had no legal existence against Collier, the third possessor, prior to the 17th June, 1839, how can any clause contained therein affect him.

O. N. Ogden, for the plaintiff and appellee.

Morphy, J., delivered the opinion of the court.

The defendant and appellant resists the execution of an order of seizure and sale upon property which he holds as a third possessor. He assigns, as errors apparent on the face of the record:

1st. That there is no affidavit, or sufficient evidence of the thirty days previous demand of the debtor, and the ten days previous notice to the third possessor, required by law; that the administering an oath is a judicial function, and the clerk had no right to administer the oath in this case.

2d. That the proceeding in this case was by the *via ordinaria*, and could not be legally changed to the *via executiva*.

I. We need not inquire whether the first assignment be well founded or not, because the plaintiff's deed of mortgage contains the clause *de non alienando*. Its well known effect is to relieve the mortgage creditor, when he resorts to his hypothecary action from the obligation or necessity of pursuing all the steps required in ordinary hypothecary suits. No oath was, therefore, required. He might have proceeded without any notice to the defendant.

Where the vendor's act of sale and mortgage contains the clause *de non alienando*, there is no oath required, or notice to the third person, in proceeding against the mortgaged property by the *via executiva* or executory proceedings.

II. As to the second, we cannot discover in the petition any prayer that citation should issue to the defendant. It pursues strictly the form of the *via executiva*. If the clerk has issued citations not called for by the plaintiff, we do not think that his right can be thereby affected.

Where the petition pursues the forms, and prays for an order of seizure and sale, the fact of the clerk issuing a citation to the defendant, will not change the suit into the *via ordinaria*.

Our attention has been called, in argument, to divers other alleged irregularities in the proceedings. Even if they were of any importance, we could not notice them because not assigned.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

VASCOCU'S WIDOW AND HEIRS *vs.* PAVIE.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE SEVENTH PRESIDING.

Where the defendant in eviction, calls his vendor in warranty, demanding the return of the *price*, and the value of the improvements, with a prayer for *general relief;* and has judgment accordingly, on this issue, it forms *res judicata*, in a subsequent action for the *increased* value and price of the land and improvements.

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The plaintiff, Felicité Sorrel, widow of J. N. Vascocu, alleges that her late husband purchased a tract containing eight hundred arpents of land, the 13th March, 1830, from Charles Pavie, for the price of one thousand two hundred dollars, for which he gave his three promissory notes of four hundred dollars each; that he made valuable improvements thereon, worth two thousand dollars, and that since his death she has been evicted by one Michael Boyce; that Pavie was duly cited in warranty to defend said suit, but that judgment of eviction was rendered, in which both the land and improvements were lost. That the land, at the time of eviction, was worth twenty dollars per arpent, and that, consequently, said Pavie is indebted to her in the sum of nineteen thousand two hundred dollars, as the value of the land and improvements, at the time of eviction, including one thousand two hundred dollars, the price paid. For all of which she prays judgment, and for general relief.

At the death of her husband, the widow took this land at the appraised value in the inventory; but the children, by a supplemental petition, joined her in this suit.

The defendant pleaded a general denial; and further averred that, in the judgment of eviction, obtained by Boyce, he was called in warranty, and judgment rendered over against him in favor of the present plaintiff, for all the matters and things now claimed, and which he avers is *res judicata*, and conclusive in his favor, and a bar to the present action. He also brought into court the original notes of the plaintiff's husband, given for the land, and which had never been paid; and prayed for judgment in his favor.

Upon these pleadings and issues the cause was tried.

The record in the eviction suit, was produced in evidence, in which the present plaintiff had judgment entered up against the present defendant in warranty, as follows:

"In this case, by reason of the verdict of a jury; and the law and evidence being in favor of the plaintiff, and judgment in eviction having been rendered in his favor; it is ordered, adjudged and decreed, that the defendant, Felicité Sorrel, recover of Charles Pavie, cited in warranty, the sum

of one thousand two hundred dollars, with interest, &c., being the amount of three promissory notes given by the defendant's vendor as the price of the land from which she is evicted."

This judgment stands unreversed and unappealed from.

There was a mass of testimony taken, in relation to the increased value of the property, and the liability of the defendant therefor. Three several trials were had in this case. At a former trial, the plaintiff had a verdict giving her nineteen thousand two hundred dollars, as the increased value of the land, which was set aside, and a new trial awarded by the court.

There was finally a verdict and judgment for eighty dollars alleged to have been paid, and the return of the notes originally given for the price of the land, and ten thousand dollars in damages. The defendant appealed.

Brent and *Bryce*, for the plaintiff.

1st. The plea of *res judicata* cannot be sustained. In the suit of eviction, the *same attorneys* represented Vascocu and Pavie, thereby showing that there was no *contestation* between them, and besides the *pleadings* in that case show, that there was no *issue* made between them as to the question of *damages*. The plaintiff, therefore, was not concluded from demanding damages in a subsequent action. *Louisiana Code*, 2265. 7 *Martin, N. S.*, 430, 621.

2d. On the merits, we contend that the jury were justifiable in basing their verdict on the increase in the value of the property from the time of sale up to the period of eviction. Whatever may have been the opinion entertained as to this question, under our laws, it is now no longer a subject of controversy, inasmuch as it has been solemnly settled in our favor, in the case of *Bissell et ux.* vs. *Erwins' heirs*, 13 *Louisiana Reports*, 148.

It is there decided, that the law *is* here, as it *was* in France prior to the adoption of the code, that the increased value of the property *invariably* formed part of the damages

assessed on the warranty, but only such increase as the parties could have had in contemplation at the time of the contract, and not such as resulted from unforeseen events, or transient or accidental causes.

In order, then, to take a case out of the *general* rule here established, it must be shown, that the increased value of the property has resulted from unforseen events or transient or accidental causes, because the law will *presume* that the parties had in contemplation all such damages as were not the result of unforeseen events, or transient or accidental causes. It will be observed, that the rule being general, and the exception being in favor of the warrantor, the burden is thrown upon him, to set forth and prove the particular facts which go to relieve him from his liability upon the warranty. If this is not, and there is no evidence to show the unforeseen event or transient or accidental cause, which has produced the rise in the value of the property, the general provision of the law at once attaches, and the increase in the value of the property must be given against him as the measure of damages. This is the case at bar.

3d. If damages be at all recoverable, based upon the increased value of the property, then we contend that the jury are the proper judges of the *quantum*, and the court will not disturb their verdict. 2 *Louisiana Reports*, 76.

4th. It is an *arbitrary* provision of the code of Justinian, that the damages on warranty shall not exceed double the price of the sale, and our courts will not be governed by it. *Pothier on Obligations*, *No.* 164. *Ibid.*, *Vente*, *No.* 133.

Dunbar and *Judge Bullard*, argued in support of the defendant's plea of *res judicata*, and against the verdict of the jury as extravagant, excessive and illegal.

Morphy, *J.*, delivered the opinion of the court.

Widow Vascocu alleges that under an adjudication lawfully made to her by virtue of a deliberation of a family meeting of her minor children, she had became the owner of a certain tract of land which her husband had purchased from

the defendant in 1830, for the sum of twelve hundred dollars; that her husband had made on said land improvements to the amount of two thousand dollars, when she was disturbed and finally evicted by one M. Boyce, in which suit she had caused defendant to be cited in warranty. She avers, that at the time of eviction the land had greatly increased in value, and prays judgment against defendant for nineteen thousand two hundred dollars, to wit: sixteen thousand dollars for the value of the land, at the time she was evicted, two thousand dollars for her improvements, and one thousand two hundred dollars for the reimbursement of the purchase money. Defendant answers by a general denial, and sets up the plea of *res judicata*, averring that all the just and lawful claims of the plaintiff had been finally adjudicated upon in her call in warranty against him in the suit brought by Boyce. An amended petition was afterwards filed, to make the heirs of Vascocu parties to this suit. This contestation has been submitted to four different juries. The three first verdicts for the plaintiff were set aside, and a motion for a new trial having this time been overruled, judgment was entered up on the last verdict for the sum of ten thousand dollars, and the return of the notes given to defendant by plaintiff's husband, which, it appears, had never been paid. From this judgment the defendant prosecutes the present appeal.

Before going into the merits of the issue joined between these parties, we must examine the plea of *res judicata* set up by the defendant, for, if it prevails, it must necessarily preclude the examination of the other points in the cause which have been argued at some length. In deciding on a plea of this kind, we must see what are the matters put at issue by the pleadings. If all that the plaintiff claims in this suit could have been granted her under the pleadings, in her call in warranty, in the eviction suit brought by Boyce, and she has not appealed from the judgment rendered therein, we conceive that it is binding on her, and forms a complete bar to the present action. What did she claim from defendant, her warrantor, in that suit? She demanded the price paid by her husband, the value of her improve-

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Where the defendant in eviction calls his vendor in warranty, demanding the return of the *price*, and the value of the improvements, with a prayer for *general relief*, and has judgment accordingly on this issue; it forms *res judicata*, in a subsequent action for the *increased* value and price of the land and improvements.

ments on the land, and concluded with a prayer for such judgment against her vendor, as equity, justice and law would authorize her to obtain. She was allowed in that suit the price paid, the value of her improvements and costs. If no damages for the increased value of the land were given, we must presume that none were proved, for we entertain no doubt that under her prayer for general relief, those damages could have been lawfully awarded, if by the law and evidence of the case she was entitled to any. Every requisite necessary to form *res judicata* between these suitors appear to exist in this case. We have the same parties litigating before us, in the same capacity, for the same cause of action, and for the same thing. *Louisiana Code, article* 2265. We disregard, altogether, the appearance of the heirs of Vascocu as plaintiffs in this suit. From the evidence it is obvious that they have no interest whatever in the issue, having been divested of all their title to the land by the adjudication to their mother, for one thousand two hundred dollars, the appraised value of the inventory; their intervening wrongfully in the suit, cannot change the situation of the original parties. Had the present plaintiff in her call in warranty against the defendant confined her answer to a citation in warranty, accompanied with a prayer for such judgment against him as law and equity would authorise, could it be contended that upon sufficient proof being made, she would not have obtained every thing which the law authorises, a vendee who is evicted, to recover of his vendor, to wit:

1. The restitution of the price.

2. The fruits or revenues, when he is obliged to return them to the owner who evicts him.

3. All the costs occasioned either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff; and finally,

4. The damages, when he has suffered any, besides the price he has paid.

If from want of sufficient evidence a vendor obtains only a part of the rights and claims to which the law entitles him, can he in a second or third suit claim successively the

several kinds of relief which grow out of his contract, and of which he could not have been ignorant at the time he called his vendor in warranty?

In a claim for a sum of money is not the plaintiff bound to claim in one and the same suit, any interest or damages arising out of the same transaction, as the principal claim? If he neglects to claim or prove them, (which is the same thing,) can he be permitted to harass his debtor by subsequent suits for them? We apprehend that he cannot. Article 156 of the Code of Practice provides, "That if one demand less than is due to him, and do not amend his petition, in order to augment his demand, he shall lose the overplus." A vendee calling his vendor in warranty, stands in the situation of a plaintiff, towards him, and must be governed by the same rule.

Applying, then, this rule to plaintiff's call in warranty against defendant, if damages were not included in her prayer for general relief, she should have amended her pleadings, so as to claim them; if they were prayed for, then it would appear that no damages were proved, and, therefore, none were granted. Upon the whole, we think that the defendant's plea ought to have been sustained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be annulled, avoided and reversed; that there be judgment for the defendant; and that the plaintiff pays costs in both courts.

HOPKINS ET AL. *vs.* LAPLACE, SYNDIC, ETC.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF NATCHITOCHES.

The granting a continuance is in the discretion of the judge, who best knows the parties and their attorneys; and although if a continuance be improperly refused, this court has power to grant relief; yet it will not interfere in a case where the discretion of the inferior judge has been correctly exercised.

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HOPKINS ET AL. vs. LAPLACE, SYNDIC ETC.

This case comes up on an appeal by the defendant, as syndic of the insolvent succession of Theodore Deterville, deceased, against the judgment of the Probate Court, allowing the opposition of D. R. Hopkins, J. B. Amant, S. Jones, and Menard, creditors of said succession, to the tableau of distribution filed by the syndic.

The defendant and appellant alleges in his appeal that there is manifest error in this judgment, and that he prays an appeal to protect his own interests and *that* of creditors, whose claims were reduced and disallowed by the oppositions of the plaintiffs.

The appellant relies on an application for a continuance, which was overruled, for a reversal of the judgment. The statement of facts, as made out by the judge of Probates on the disagreement of the parties, and other evidence, shows, that this case had been continued twice, on the motion of the syndic, on account of the absence of his counsel.

At the July term, 1836, the case first came up for trial. The first continuance was obtained on the motion of an attorney, who appeared at the instance of the syndic, on account of the sickness of his regular counsel. On Monday, the 26th of September, when the case came up again for trial, Mr. Sherburne, the counsel for the syndic, was in attendance. He made a motion for a continuance, stating that the case required more labor and investigation than the state of his health enabled him to give it. He further stated, that his attendance at the last term had brought on him an inflammatory fever, which increased his debility. That when he first came in from the country he was in hopes of being able to go through the case, but found himself unable to proceed with it.

The court remarked that the case could no longer be continued on the ground of sickness of counsel. The plaintiff's counsel then stated, that the defendant said he would employ Mr. Campbell, an attorney who resided there, but then absent, if Mr. Sherburne continued in ill health, so soon as he returned. Mr. Sherburne being present, stated he was unable to point out any day for Mr. Campbell's

return, but that he did not expect him until the beginning of the next week. The court then, on motion of plaintiff's attorney, ordered an adjournment, from day to day, until the following Saturday, on which day this case was ordered to be fixed for trial. When this order was made, the plaintiff's counsel stated that Mr. Campbell must be in town in the course of the week, and in case of Mr. Sherburne's inability on account of sickness, to represent the defendant, he would be present to do so. When the cause was tried, Mr. Campbell had not yet returned, and Mr. Sherburne was out of town.

When the pleadings were first made up, the defendant had two other attorneys, whose names appear in the record; but it appeared they had withdrawn from the case.

Judgment was rendered in favor of the plaintiffs, sustaining all their oppositions, disallowing many of the claims paid and put on the tableau; from which the syndic appealed.

Dunbar and *Sherburne*, for the appellant.

Winn and *Brent*, contra.

Martin, J., delivered the opinion of the court.

The appellant complains of the refusal of the judge of Probates to grant him a continuance. He had filed his tableau of distribution, the homologation of which was opposed by the present appellees. They resisted his application, made on the ground of the indisposition of his attorney, by showing that the case had been continued three times on the allegation of the same cause; and by showing that the appellant had two other attorneys on the record, and that still other attorneys might be had. After overruling the motion for a continuance, the court, on the plaintiff's motion, continued the cause, from day to day, for a week, in order to afford an opportunity to the appellant to avail himself of the services of an attorney then absent attending court, and was expected daily to arrive. At the end of the week, this gentleman not having arrived, and the other attorney of the appellant being out of town, the trial of the cause was proceeded in.

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The granting of a continuance is in the discretion of the judge, and it was once questioned whether this court could inquire into and relieve a suitor who showed that this discretion had not been correctly exercised. We held that we could. *Broussard* vs. *Trahan's heirs*, 4 *Martin*, 489.

The inferior judge has peculiar advantages over us, in deciding on the propriety of granting such motions. He best knows the parties and their attorneys; has better opportunities to examine their conduct, especially in a case which is long pending before him. This court has no advantage over the inferior tribunals, but in the number of its members.

The present case appears to us to be one in which the discretion of the judge was evidently exercised correctly. The appellant had three counsel on record; the indisposition of one of them had been protracted for three months, during which as many continuances had been granted. On according the first, the judge had declared that he would not grant another, unless a better cause was shown; yet the appellant obtained *two* others, and afterwards a postponement of the trial, from day to day, during the week. It is impossible for us to resist the impression that, if due diligence had been exercised, the appellant might have availed himself of the services of one of his two other attorneys on record, or of some other gentleman of the bar. It is sworn that there were two attorneys in town, and others could have been had by sending to Alexandria.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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ON A REHEARING.

Where a rehearing is granted only on a particular branch of the cause, no other part of it can be examined in the second trial.

In this case a rehearing was prayed for and granted, so far as it relates to the merits, but refused on the other branch of the case.

Dunbar and *Campbell*, for the appellant, insisted that there was material error in the judgment appealed from, and that it should be reversed, and the case remanded for a new trial.

2. The syndic appealed not alone for himself, but on behalf, and as the agent of all the creditors. It appears from the record, that the judge of probates never advertised the tableau of distribution as the law requires, notifying the creditors thereof. This alone is error apparent on the record, which may be noticed without a formal assignment, and is sufficient to reverse the judgment, and have the case remanded. 2 *Moreau's Digest*, 434. 5 *Martin, N. S.*, 341.

Morse, *Winn* and *Brent*, contra.

Strawbridge, *J.*, delivered the opinion of the court.

At a former term this cause was heard, and the judgment below affirmed. On application for a rehearing the following order was made: "The motion for a rehearing in this case, so far as it relates to the refusal of the court below to grant a continuance, is refused; but as to the merits it is allowed, and the cause continued to next term of this court." We have heard an argument at some length, and have toiled through a long and badly made up record, in search of the merits, without finding them.

An opposition was made to the syndic's account. After being continued two or three times, on the ground of the indisposition of his counsel, another motion was made to continue the cause, on an affidavit, stating the same reasons,

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Where a rehearing is granted only on a particular branch of the cause, no other part of it can be examined in the second trial.

together with others. This was overruled; the cause tried, and judgment rendered; from which the syndic appealed. A statement of facts was made by the judge, which comes up with the record; but it shows only the facts connected with the refusal to continue on the ground of the absence of counsel. This, together with the affidavit on which the application to continue was made, furnish the only grounds of the last argument; and we are satisfied that under the order recited above they cannot be considered.

On the merits, no testimony appears on the record, except that proving the plaintiffs' debt, which is made out. We are, therefore, unable to say, whether the judgment, striking out certain items, and allowing others, was correct or not; but as the defendant and appellant has failed to bring up the record properly, but has gone to trial without applying for any aid from this court, to supply the defects, if any, we decline to alter the former judgment.

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APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CARROLL, THE JUDGE THEREOF PRESIDING.

The signature of a constable to a return of service of citation, made by him, will be taken as true, without proof being made of it.

The nullity of a probate sale cannot be sought in a direct action in the District Court. The order of sale by the Probate Court is held to be a judgment which protects purchasers under it.

So, where heirs sue, in the District Court, to recover from the purchaser and third possessor of property sold at the probate sale of their ancestor's estate, on the ground that the proceedings and sale by the court of probates was illegal, and should be cancelled and annulled: *Held*, that this is in the nature of an action of nullity, and the District Court is without jurisdiction.

This action was instituted by the tutor of two of the heirs of W. Graham, deceased, and by the under tutor of the other heir, to annul and set aside the probate sale of the property of the estate of their ancestor, which they allege was sold contrary to law. The plaintiffs allege, that the sale in question was made without any notice to them, or the advice of a family meeting, and purchased in by William Benjamin, at the time tutor to one of the heirs, and under tutor of the others, and who was incapable of purchasing. They allege various other irregularities and nullities in said sale.

The plaintiffs further allege, that the property in question is now in the possession, and owned by one Ambrose Gibson, who resides in Mississippi. They pray that a curator, *ad hoc*, be appointed to defend said absentee, and that they have judgment annulling the sale, and decreeing to them the property, with the revenues and damages.

The defendant, Gibson, by his attorney, averred that he purchased the property in contest from one J. C. Drew, whom he calls in warranty, and sets up various demands against him.

Drew appeared, and declined to answer to the demands in warranty; but excepted to the plaintiffs' petition, and denied that the tutor or under tutor of Graham's heirs had ever been authorized to institute this suit.

At this stage of the proceedings one of the heirs married A. M. Tompkins, who authorized his wife to prosecute the suit in her own name.

Drew further excepted, and denied that the District Court had any jurisdiction of the matter set up in the petition:

1. That the sale sought to be annulled, was ordered by a judgment of the Probate Court, which could only be annulled and avoided by a suit in that court.

2. That the appointment of a special tutor, complained of in the petition, can only be inquired of in the Court of Probates; wherefore, he prays that all these matters be stricken out of the petition, and that he be dispensed from answering it.

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The cause was tried on this issue; and the district judge presiding, decided that the plaintiffs had no authority to institute and carry on this suit; and that the District Court was without jurisdiction to try it. Judgment of non-suit was rendered against the plaintiffs, and they appealed.

Stacy and *Bullard*, for the plaintiffs, insisted that the probate sale was illegally made, and the District Court was competent to inquire into the illegality of the sale, and to set it aside. See 11 *Louisiana Reports*, 384.

2. The second exception taken to the jurisdiction of the District Court, incorrectly sets out the allegations in the petition. It is not therein stated that the probate sale was made in virtue of an order of court; on the contrary, it is said that the sale was made *without any legal* order of court. No order of court is sought to be annulled, or set aside: But if it were so, and it were necessary to set aside the proceedings of the Probate Court, the District Court has jurisdiction to examine them, and if necessary to set them aside. *Code of Practice, article* 983. 2 *Louisiana Reports*, 23. 3 *ibid.*, 242.

Dunlap and *M'Guire*, for the defendant, Drew, called in warranty, moved to dismiss the appeal for want of legal service of citation on this appellee. The service was made by a constable, purporting to be authorized to do so by the sheriff, and there is no proof that this man *is a constable*. His signature is not to be taken as proof.

2. On the merits, they contend that, in the first place, the tutor and under tutor were without power or authority to sue, unless specially authorized.

3. That this is a suit to annul the proceedings of the Probate Court, and is in the nature of an action of nullity, and the District Court is without jurisdiction.

Selby, for defendant.

Strawbridge, J., delivered the opinion of the court.

A motion has been made to dismiss the appeal on the ground of insufficient service of the citation.

The return is made by a person signing himself "A. B., *constable.*" The errors alleged are:

1st. That a constable is not authorized to serve citations from the District Court.

2d. That there is no proof of his authority.

Article 765 of the Code of Practice, provides, that "sheriffs may notify and execute the different orders, citations, &c. by means of constables;" "they being responsible, however, for the manner in which the constables may perform this duty."

On the second point, it has been held that our courts will recognize the *signatures* of officers appointed by the governor, &c. Constables are appointed by the police jury of each parish, and the parish judge administers to them an oath, and files their bond, with security, and delivers them a certificate of their appointment.

The signature of a constable to a return of service of citation, made by him, will be taken as true, without proof being made of it.

Had the return been made by a deputy sheriff, it would, it appears to us, have been sufficient; and we would take his signature for true. We cannot perceive how this case differs in principle, when confined to acts of a constable, exercised within the limits of the parish.

We, therefore, overrule the motion, and sustain the appeal.

We now proceed to examine the case on the merits.

This suit is brought by the tutor and under tutor of some minors. The petition states that the parent of the minors, Graham, left a large amount of real and personal property. "That on the 20th December, 1834, a public sale was made by the Court of Probates for the parish of Carroll, where they reside, of certain lands belonging to his succession," which they specify. "That said sale was illegal, null and void. That for more than a year preceding it, the plaintiff had been tutor to said minors, but had no notice of said sale; and that the purchaser at said sale could not legally buy." They allege various other illegalities, and conclude with a prayer that they be decreed to recover the said property; be adjudged owners of the same, and put in possession thereof.

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That the probate sale, before set forth, on the 20th December, 1834, and all the proceedings had in relation to it, be avoided, cancelled, annulled and set aside.

There was a plea to the jurisdiction of the District Court as to these matters, which was sustained by the judge, and from that decision this appeal has been taken. We do not doubt of the right of the District Court to examine into matters of probate jurisdiction, when they are brought before it collaterally, and *vice versa*. Nor do we doubt that the Court of Probates is without power to entertain a suit in revendication.

The nullity of a probate sale cannot be sought in a direct action in the District Court. The order of sale by the Probate Court is held to be a judgment which protects purchasers under it.

But we do not deem the nullity of the probate sale to have been brought before the District Court in this suit collaterally; it is the head and front of the suit itself; and the court is called upon to avoid, cancel and annul the acts of the Probate Court, which is, to our view, a direct action of nullity.

The order of sale, it has been held, is a judgment, and that the purchasers under it are protected. 13 *Louisiana Reports*, 436.

We have just expressed the opinion in the case of Brosnaham et al. *vs.* Turner, that a party to a judgment cannot question it collaterally. See the authorities there cited.* Though the present tutor denies any knowledge of this sale, we perceive, by the proceedings, that there has been a former tutor. The sale may have been made by an executor to pay debts, and so the tutors have neither been cited, nor had any knowledge. For these reasons, it appears to us the judge of the District Court properly sustained this exception, and we affirm his judgment, with costs.

* The judgment in the case of Brosnaham et al. *vs.* Turner, has been suspended, and a rehearing granted.

MARSHALL *vs.* FOGLEMAN.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF AVOYELLES, THE JUDGE OF THE SEVENTH PRESIDING.

Where a part of the calls and boundaries expressed in a deed are inconsistent with the stipulations in the contract of sale, and impossible to be complied with, they will be disregarded.

This is an action of partition. The plaintiff alleges that John and Dennis M'Daniel and M. Fogleman purchased from the United States a small tract of land on Bayou Bœuf, containing ninety-six acres, entitled, Lot No. 2; that, by a private agreement between them, D. M'Daniel was to pay for forty acres, M. Fogleman for thirty-six, and J. M'Daniel for twenty acres of this tract; that, since that agreement, he has purchased John M'Daniel's share of twenty acres, which the defendant, Fogleman, refuses to set off to him, according to their contract, but, availing himself of the state of indivision, has entered the back lands, disregarding the rights of his co-proprietors; that, when called on to set off the twenty acres from the tract of ninety-six acres fronting on Bayou Bœuf, he consents only to laying off ten acres of the front tract and ten acres from the back concession so entered by him. He prays that the defendant be compelled to make an equitable partition, and that the twenty acres be taken from the front tract of ninety-six acres, &c.

Fogleman pleaded a general denial, and denied specially that the plaintiff was assignee of J. M'Daniel. He averred that the plaintiff, with a view to defraud him, induced him to execute an act of sale the 22d October, 1833, transferring the twenty acres, as M'Daniel's share, to him, in accordance with an agreement between the M'Daniels and him, (Fogleman) left with the Register at Opelousas, dated the 16th November, 1830, by which this respondent considered himself bound to convey this quantity to M'Daniel; but that the plaintiff has practised a fraud in obtaining said act of 22d October, 1833, by which he claims another twenty acres, &c.

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He prays that said act be annulled as fraudulent, and this suit dismissed.

He further avers, he never received any consideration for said land, and that the sum of twenty-five dollars per acre, mentioned in said act of sale as the price, is not true, and in this respect it is simulated and fraudulent.

In a further and supplemental answer, he avers, that he has always been ready to set off and convey the twenty acres of land, as specified in the said act of sale, and that, long before this suit, he offered to deliver the land, according to the deed of sale; which was surveyed for this purpose, and the plat and certificate of survey delivered to the plaintiff, who has been in undisturbed possession ever since; wherefore he prays that the suit be dismissed.

Upon these pleadings and issues the cause was tried.

The parish surveyor's plat and survey showed that the defendant offered to set off the twenty acres at the lower end of the tract of ninety-six acres, which, although it originally belonged to the M'Daniels and Fogleman jointly, had been entered, the 19th May, 1831, in the name of the latter alone; and in the rear of this tract he had also entered the back concession, containing seventy-six acres, in July, 1833. To run off the twenty acres fronting on Bayou Bœuf, as the defendant proposed, would have taken only ten acres from the front tract of ninety-six acres, and ten acres from the the rear, or swamp tract of seventy-six acres.

The act of sale from Fogleman to Marshall, for J. M'Daniel's share, dated the 22d October, 1833, expressly says, that the twenty acres thus sold is to be taken from the lower part of Fogleman's land; "to take such front on Bayou Bœuf, and running east *to the township line, to make twenty acres*," "being the same entered on the 19th May, 1831, and a part of lot No. 2, purchased by an agreement between D. M'Daniel and Fogleman, for which Marshall pays Fogleman twenty-five dollars per acre."

The memorandum of agreement between M'Daniel and Fogleman, in November, 1830, when they were about entering the lot No. 2, containing ninety-six acres, was offered in

evidence, and rejected on the motion of the defendant, as not making proof between these parties..

The district judge gave judgment, ordering the twenty acres to be set off as the defendant offered, fronting on Bayou Bœuf, and running to *the township line.* The plaintiff appealed.

Cushman, for the plaintiff.

1st. This is essentially an action of partition, and the plaintiff should not be decreed to pay the whole costs.

2d. The judgment of the court *a qua* does not decree the partition in conformity to the contract or agreement of the parties.

3d. The judgment of the court below should have decreed to the plaintiff twenty acres, to be taken out of the original tract of ninety-six acres, held between the co-proprietors, in conformity to an agreement between them.

4th. This agreement, though a *sous seing privé* act, is expressly referred to in the public or notarial act executed by the parties to this suit. 3 *Louisiana Reports,* 427, and 2 *Ibid,* 70.

5th. The notarial act is free from all ambiguity, and clearly expresses the intentions of the parties to the same.

Curry, for the defendant.

1. The record shows, in the act of sale from Fogleman to Marshall, dated 22d October, 1833, that the latter sells to the former "twenty acres of land on the lower part of his tract, to take such a front on Bayou Bœuf, and running east *to the township line,* as to make twenty acres." By reference to the plat and judgment of the district court, it will be seen, that the plaintiff has had his twenty acres set off in this manner. It fronts on the Bayou Bœuf, and *runs to the township line,* as expressed in the act of sale. The defendant has always been ready to make a partition in this manner, and it is therefore not his fault that the plaintiff did not get

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his land set off to him without suit; the defendant should not, therefore, be mulct in costs.

2. The judgment of the District Court is correct. It *gives the land*, as expressed in the act of sale by the parties themselves, and should therefore be affirmed, with costs in both courts.

3. The plaintiff relies on a memorandum of agreement between Fogleman and D. M'Daniel, at the Land Office, dated the 16th November, 1830, in which they specify the interest and number of acres each are to have in a lot of ninety-six acres, and which they were then about entering. This memorandum cannot make evidence for the plaintiff. He is no party to it, and it is not proved or shown to be authentic. It was objected to by the defendant's counsel, and excluded by the court. The case must be decided according to the agreement between the parties to this suit, to wit, the act of sale of the 22d October, 1833. It expressly declares that the plaintiff shall take such front on Bayou Bœuf, *and running east to the township line, to make twenty acres.* This has been done, and was offered to be done by the defendant before suit.

Strawbridge, J., delivered the opinion of the court.

The plaintiff claims twenty acres of land, being part of a larger tract of ninety-six acres situated on Bayou Bœuf, together with the back concession, which he alleges the defendant entered after having sold him the front.

The defendant, after an answer denying his right, and an amended answer, filed a second amended answer, in which he admitted the plaintiff's right, and agreed to a partition according to their written agreement. This agreement referred to a private act filed in the land office, a copy of which was produced at trial, but rejected as not being evidence. On the correctness of this decision, to which a bill of exceptions was taken, we do not decide, as we come to the same conclusions as though it had been admitted.

The defendant was owner of two tracts—No. 2, of ninety-six acres lying on Bayou Bœuf, acquired from the United

States on the 20th May, 1831, and No. 1, lying in the rear and between No. 2 and the township line, which we understand to be the back concession spoken of, acquired from the United States 25th July, 1833.

The act of sale from defendant to plaintiff bears date 22d October, 1833. From these dates it is clear that the defendant, owning both front and rear at the time of sale, the plaintiff had no right to the back concession, unless it had been specially conveyed by the defendant.

The difficulty is to ascertain where the twenty acres are to be laid off. The description in the act is of twenty acres, "to be taken from the lower part of the tract on Bayou Bœuf running east *to the township line*, being the same entered on the 19th May, 1831, and a part of lot No. 2, purchased by an agreement between M'Daniel and the defendant."

Where a part of the calls and boundaries expressed in a deed are inconsistent with the stipulations in the contract of sale, and impossible to be complied with, they will be disregarded.

This agreement is the one, a copy of which was excluded as above stated. To run this line to the township line, the survey must cross the rear tract, and in doing this the land would not be taken from lot No. 2, purchased in May, 1831, but must cross and include a part of No. 1, purchased in July, 1833. To decide on this discrepancy, the only further guide left us is a plat made by order of the District Court, and the instructions of the defendant's attorney given to the surveyor appointed by the court, which state that the land sold was part of the ninety-six acres, but still directs it to be laid off running to the township line. It is certain the land made part of the ninety-six acre tract. To lay it off "running to the township line," was impossible, as this tract did not reach there. We therefore think the decree of the District Court, directing the twenty acres to be taken from the two tracts, was erroneous.

It is, therefore, ordered and decreed, that the judgment be reversed, and that the plaintiff recover the space marked on the plat by the red letters A, B, D, E, forming part of No. 2, containing ninety-six acres, entered 19th May, 1831, and that the defendant pay the costs of both courts.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF CARROLL.

No appeal lies from a judgment overruling an exception to the jurisdiction of the court.

This was a suit in which the plaintiff claimed the sum of one thousand dollars from the defendant, as administratrix of her deceased husband's estate.

The defendant excepted, and declined the jurisdiction of the Probate Court, because there was no executor, administrator or curator appointed to said estate; and that she was only in possession and administered the same as widow, in community and tutrix of the children; that it was sought to render her personally liable, the debt being against her in her individual capacity, and not as a debt of the succession: she therefore declines the jurisdiction, and avers that the case belongs to another tribunal, to wit, the District Court, and prays that the suit be dismissed.

There was judgment overruling this exception; and final judgment on the merits was entered up against the defendant for the amount of the plaintiff's claim.

The defendant appealed from the judgment overruling her exception, only.

Dunlap and *Copley*, for plaintiff, moved to dismiss the appeal, on the ground that the judgment appealed from is not such a final judgment as works an irreparable injury, and from which an appeal will lie.

Stacy, contra; admitted no appeal would lie from the interlocutory judgment; but he insisted that the appeal embraced the final judgment as well as the other, which should be reversed.

Strawbridge, J., delivered the opinion of the court.

This appeal is taken from a judgment of the Probate Court of the parish of Carroll, overruling a plea to its jurisdiction.

It has been settled by the decisions of this court, that an appeal from such a judgment is not admissible, as it produces no such injury as may not be remedied on an appeal from the final judgment.

The best service, therefore, we can render the defendant is, to dismiss the present appeal in time to permit her to appeal from the final judgment, which it appears by the record has been already rendered, which is accordingly ordered at her cost.

ARMSTRONG *vs.* LEVY ET AL.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, JUDGE COOLEY, THEN OF THE FOURTH JUDICIAL DISTRICT, PRESIDING.

Where the seal of the court is not affixed to the record of a judgment suit in another state, and the certificate of the clerk is irregular, it will not furnish sufficient authentic evidence to authorize the executory process to issue on it in this state.

In this case, the plaintiff obtained from the district judge presiding an order of seizure and sale, on a record and judgment in favor of the plaintiff against the defendants in the state of Mississippi, for the sum of three thousand three hundred and twenty-eight dollars and twenty cents. The record is made out, and purports to be certified according to the act of Congress, to make it authentic in the several states of the Union. From the order of seizure and sale, granted by the district judge, the defendants prayed and were allowed an appeal direct to this court.

Dunlap and *Dunbar*, for the defendants and appellants, assigned errors apparent on the face of the record, and par-

ticularly that the record from Mississippi was not duly attested under the seal of the court, according to the law of Congress, no seal being attached thereto.

Selby, for the appellee, insisted that the Mississippi record was duly certified, and was sufficiently authentic to authorize the issuing of the executive process.

2. The clerk certifies that he affixed the seal of court, and it must be presumed that it was done, and that the scroll affixed to the signature is the seal. It is also to be presumed that the court in Mississippi rendered judgment on proper and sufficient evidence; at any rate, it is for the other side to show the contrary.

Morphy, J., delivered the opinion of the court.

The defendant seeks the reversal of the judgment on an assignment of error apparent on the face of the record; it is sufficient to examine one of them.

The judgment is one obtained at chambers, rendering *that* of a court of an adjacent state executory in this, and ordering a writ of seizure and sale therein. The error assigned is, that the record of the court of the sister state is not certified in the manner prescribed by the law of Congress, and required by the Code of Practice, the clerk's certificate not being authenticated by the seal of the court, nor showing that the court has not a seal; on the contrary, stating that the seal is affixed, which negatives the idea that the court is without a seal. The certificate being thus irregular, the first judge erred in declaring the judgment executory in this state, and ordering the writ of seizure and sale to issue.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the plaintiff and appellee paying costs in both courts.

HEWITT *vs.* SEATON ET AL.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF MADISON, THE JUDGE THEREOF PRESIDING.

In an action of slander of title, claiming damages, it is not necessary to allege and show that the defendant is in possession; and his exception, disclaiming possession and title, will not authorize the dismissal of the suit. The plaintiff has the right to try the issue of slander of title, and to show damages, if he can.

This is in the nature of an action of slander of title, in which the plaintiff claims to be the owner of a tract of seventy-seven acres of land, but the title to which, he alleges, is slandered by the defendants, who, he alleges, claim title thereto. He prays that they be cited to set forth their title, if any they have, and that, in failing to do so, they be forever enjoined from setting up title hereafter, and that the possession be delivered to him by the sheriff, and he be decreed the true owner thereof.

The defendants filed an exception to the maintenance of this action, because they were not at the time, nor before the institution of suit, in the possession of the land claimed; nor do they set up any title thereto, and they deny that the plaintiff has any. They pray to be dismissed, with their costs.

There was no evidence that the defendants were ever in possession of the land, or claimed it.

The court was of opinion the action was a petitory one, and not an action for slander of title; that the evidence supported the defendant's exception. The suit was dismissed, and the plaintiff appealed.

Copley, for plaintiff.

Stacy, contra.

Morphy, J., delivered the opinion of the court.

The petitioner sets forth that he is the true and lawful owner of a certain tract of land; that the defendants set up

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title to the said land, and prevent him from taking quiet and peaceable possession of the premises, by reason of which he has suffered damages to the amount of ten thousand dollars: he prays, that they may be cited to make out and establish their title to the said land, if any they have, and that, should they fail to show a good and valid title, they may be decreed to pay him said damages; that they be enjoined from slandering his title, or setting up any in themselves, and that the land be delivered to him by the sheriff. The defendants except to plaintiff's action, on the ground that they are not in possession of the land sued for; they disclaim all title to the same, and plead a general denial to all plaintiff's allegations. The judge *à quo*, considering this action as a petitory one, sustained the exception of defendants, and dismissed the petition. The plaintiff appealed.

It appears to us that the petition was improperly dismissed. The disclaimer of defendants put an end to the question of title, but left to be tried the issue joined as to the damages claimed by the plaintiff for the slander of his title, and his having been prevented by defendants from taking peaceable possession of his property. The petition does not allege that defendants are in possession, which averment it would have been incumbent on him to make and prove before he could maintain a petitory action; his main object seems to have been to hold defendants to the proof of the title, or right, which they had publicly set up to his land. Their disclaimer of title in court could not prevent plaintiff from having the facts alleged by him investigated, and his damages awarded him, if he is entitled to any.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and this case remanded for further proceedings, according to law, and that defendants pay the costs of this appeal.

LATTIMORE *vs.* DAVIS.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

The estate below, owes a servitude to that above it, to receive the waters which naturally flow from the upper estate; and the proprietor below is not at liberty to raise a dam or make any work to prevent this running of the waters; but this must be a natural servitude, not created by the industry of man.

The clearing of land, and fitting it for agriculture, by cutting ditches and canals, cannot be considered as making this servitude more onerous, if it pursues the natural drains.

But, where the proprietor of the upper estate cuts ditches and makes drains on to the lower one, without following the natural drains and flow of the waters, he will be liable for all damages sustained by the overflow of the waters.

This is an action to recover damages from the defendant for injuries done to the plaintiff's plantation and land, by draining his own land on to that of the latter.

The plaintiff alleges that the defendant owns a plantation situated above, and adjoining to his, on the Mississippi river, in the parish of Concordia; that in the spring of the year 1833, the latter cut ditches, and drained his land on to that of petitioner, without following the natural drains, and by means of said ditches conducted nearly all the water off his plantation into a small pond lying between, and by that means overflowed his plantation, so that it prevented him from making any cotton crop that year, to his great damage, ten thousand dollars, for which he prays judgment.

The defendant pleaded a general denial; and claims two thousand dollars in reconvention for damages occasioned by the illegal conduct of the plaintiff in excavating and cutting away a road or levee he made on his own land, between him and the plaintiff, and also in throwing up a large levee in said road, damming up the water, and stopping up a bayou or natural drain which runs through both their plantations,

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and has always been an important drain to their plantations, but which the defendant has so far obstructed as to cause it to flow back on his plantation above, &c. He prays judgment for his damages in reconvention, &c.

The surveyor made a diagram, representing the location and situation of the two tracts of land, which, together with the evidence, was submitted to a jury. They were of opinion the defendant was in fault, and that his draining on to the plaintiff's land caused the loss of crops and other damage to him, which they assessed at seven thousand dollars. Two of the jurors made affidavit that their verdict was intended to include loss of crops for the year 1833, and up to the time of finding their verdict in December, 1837.

A new trial was applied for and granted.

On the second trial a mass of testimony was produced, relative to the injuries complained of between the parties. The cause was again submitted to a jury, who returned a verdict for the plaintiff in the sum of one thousand five hundred dollars. And from judgment rendered thereon, the defendant appealed.

Stacy, for the plaintiff, argued to show that the defendant, by his own acts, had cut ditches and drains, changing the natural servitude; and caused the water to flow in different channels from the natural one, by which the plaintiff's plantation was overflowed, and the water coming down from the upper one became stagnant on his, and destroyed his crops.

Dunlap and *Dunbar*, for the defendant, contended:

1st. The relative position of the lands of plaintiff and defendant, shows a *natural servitude* in favor of the tract of defendant.

2d. The defendant had a right to remove any obstruction to the exercise of his servitude erected by plaintiff, and to go on to plaintiff's land for the purpose, provided it was done without *riot*. *Louisiana Code*, 768–770. 3 *Blackstone's Commentaries*, 216. 1 *Partidas*, 442. The evidence clearly shows, *either* that plaintiff's levee *obstructed* a natural drain, or that the *cutting* of it did him no injury.

3d. Even if the ditches constructed by defendant were shown to be injurious or burdensome to plaintiff, still if it were *necessary to the culture* of defendant's tract, plaintiff cannot complain. Articles of the Code 656 and 663, are not to be construed too strictly to the injury of the interests of agriculture. *Duranton, 5th volume, page* 160. 12 *Louisiana Reports*, 501.

4th. But it is shown by the evidence, conclusively, not only that the ditches were absolutely necessary to the *culture* of defendant's plantation, but also that they were not injurious to plaintiff, but beneficial to him. It is shown, also, by the evidence, that the inundation of 1833 was caused by the heavy and extraordinary rains of that year.

Morphy, J., delivered the opinion of the court.

The plaintiff seeks to recover damages, alleging that by defendant's illegal acts and omissions he has brought together and concentrated all the waters of his plantation in a certain pool or pond, not a common drain, lying and extending on both their premises; that afterwards he has, by cutting through a causeway on his (plaintiff's) plantation, let into his field of cotton such a body of water as has overflowed it, and rendered all cultivation impossible. The defendant denies that he has done any injury to plaintiff, and claims damages in reconvention, averring that plaintiff has illegally erected a levee or embankment on his land, and done other acts, whereby the natural flow of his waters has been obstructed, and his (defendant's) land covered with water. This case has been before two juries who brought in verdicts for the plaintiff, and judgment having been entered upon the last verdict, the defendant appealed.

The parties are owners of adjacent tracts of land fronting the Mississippi, and extending back to Lake Concordia, on which they also have a front. From both fronts there is a slope or descent towards a certain bayou, situated some way between, but nearer the lake. It is admitted that plaintiff's tract is situated below that of defendant, and must receive the waters which *naturally* flow from it; but plaintiff con-

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tends that the natural drain of both plantations, and through which he was bound to receive on his estate defendant's waters, was the large bayou situate in the rear of their lands; that defendant by improperly or insufficiently ditching his plantation, has caused the waters to accumulate in a pond between the bayou and the front of their plantations, instead of running into the bayou, which is lower than said pond; that to avoid injury and loss to himself from this accumulation of water, defendant has cut through a causeway or levee that had been on his land for years, and thus let in a larger body of water than would naturally have flowed on his plantation. The evidence on these points, as well as on the defendant's adverse allegations, is voluminous and somewhat contradictory. The law of the case presents no difficulty. The nature and extent of the servitude due by plaintiff's land, are clearly defined by our Code, article 656. We have been referred to the case of Martin *vs.* Jett, 12 Louisiana Reports, 503. It determines, very correctly we think, that the clearing of land, and the fitting it for agricultural purposes, by proper ditches and canals, cannot be considered as an act rendering a servitude of this kind more onerous, and that a different interpretation would condemn the superior estate to sterility, and be contrary to the interests of agriculture. Here the facts alleged are widely different, and would tend, in our opinion, to render the servitude due by plaintiff more burdensome. As to the sufficiency of the evidence on these facts, and the extent of the injury complained of, the jury were the legitimate judges. They were acquainted with the premises; nay, the evidence shows that they had a view of them from the very court-house where they sat in judgment between the parties; and it would require strong evidence indeed, to induce us, without any knowledge of the localities but what the record furnishes, to disregard the finding of two juries of the immediate neighborhood.

The estate below, owes a servitude to that above it, to receive the waters which naturally flow from the upper estate; and the proprietor below is not at liberty to raise a dam, or make any work to prevent this running of the water; but this must be a natural servitude not created by the industry of man.

The clearing of land, and fitting it for agriculture, by cutting ditches and canals, cannot be considered as making this servitude more onerous, if it pursues the natural drains.

But where the proprietor of the upper estate cuts ditches and makes drains on to the lower one, without following the natural drains and flow of the waters, he will be liable for all damages sustained by the overflow of the waters.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ALLEN *vs.* PETROVIC ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE DISTRICT PRESIDING.

The surety, to entitle himself to the right of discussion, must pursue the formalities pointed out in article 3016 of the Louisiana Code, or his plea will be overruled.

This is an action against the endorsers and surety on the the following note:

"$950 68-100. Natchitoches, March 7th, 1837. Twelve months after date I promise to pay to the order of Messrs. Petrovic & Co., the sum of nine hundred and fifty dollars and sixty-eight cents, for value received, payable and negotiable at the branch of the Exchange and Banking Company of New-Orleans, at Natchitoches.

"W. B. WEATHERBY."

Endorsed "P. PETROVIC & Co."

"I endorse this as security only; WM. LONG; security for the final payment of this note, provided this note is protested at maturity. Natchitoches, December 15th, 1837."

The petition alleges that Peter Petrovic, John F. Cortes, and John Laplace, were co-partners at the time of endorsing the note, trading under the style and name of P. Petrovic & Co.

The notary's certificate showed that the note was duly protested, and notice of protest properly served on all the endorsers.

There was judgment against the surety and all the endorsers *in solido*, from which Long, the surety, appealed.

Waters, for the plaintiff and appellee, prayed for the affirmance of the judgment with ten per cent. damages, for a frivolous appeal.

Tuomey, for the appellant, Long, submitted a written argument, insisting on the right of discussion on behalf of Long; that he was bound only as a surety, and execution should be

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stayed, as to him, until the property of the principal debtor was first seized and sold. *Louisiana Code, article* 3020. *Filhiol* vs. *Jones*, 8 *Martin*, 636.

Morphy, J., delivered the opinion of the court.

The surety, to entitle himself to the right of discussion, must pursue the formalities pointed out in article 3016 of the Louisiana Code, or his plea will be overruled.

The defendants are sued as endorsers of a promissory note, and the petition contains the usual averments of demand, protest and notice. The first endorsers, Petrovic & Co., made a general denial, while the other, William Long, averred, that he endorsed the note only as security, and pleaded the right of discussion. Plaintiff obtained a judgment, from which the defendant, William Long, prosecutes this appeal. The surety not having entitled himself to the benefit of discussion, by complying with the formalities required by law, his plea cannot avail him. *Louisiana Code, article* 3016. The appellee has prayed for damages in this court, on the ground that this appeal has been taken only for delay. We cannot but view it in the same light.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per cent. damages.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF CATAHOULA.

Where property is sold at probate sale for less than the sum for which it is mortgaged, the mortgaged creditor can only be placed on the tableau with a privilege for the amount of the sale, and for the balance of his claim he must be set down as an ordinary creditor.

This is an action by the plaintiff, Baldwin, and several other creditors, who joined their claims with his, against the defendant, as administrator of one P. L. Gwinn, deceased, charging him with neglect of duty in failing to collect and

pay over the moneys of the succession. They pray that he be ordered to account, and be made personally liable for any losses the estate may have sustained in consequence of his negligence; that certain property of the succession yet unsold, be disposed of, and that they have their claims allowed and paid.

The defendant denied that he was guilty of any neglect; and was ready to account for all the funds he had received, and that there was not sufficient funds to pay the privileged creditors. He expressed his readiness to dispose of the remaining property; and also filed an account, or provisional tableau.

In this statement he placed himself on the tableau as a privileged creditor for the sum of four thousand four hundred and thirty-six dollars, being for notes taken up and paid off by him as security, bearing mortgage. Among them were three notes given by Gwinn, with defendant as surety, amounting to three thousand six hundred dollars, to the estate of Elizabeth Bowden, deceased, for the purchase of slaves, with a mortgage thereon. These slaves were sold at the probate sale of Gwinn's estate for three thousand and twenty-five dollars; but the defendant set down all his debt as a privileged one, and claimed to be first paid. The plaintiff and other creditors made opposition.

The judge of probates homologated the account, and gave judgment allowing the defendant's privileged claims. The plaintiffs appealed.

This case was submitted to this court by counsel, without argument or written points, on detached documents and original papers, under an agreement of the parties.

Morphy, J., delivered the opinion of the court.

The plaintiffs state themselves to be creditors of the estate of one P. L. Gwinn, and call upon the defendant as administrator of the same, to file a true statement of his account, showing the amount of funds collected by him; and that he should be made liable for all losses sustained by the estate, through his neglect to collect the debts; and finally, that all

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property yet unsold be disposed of to liquidate the debts of the estate. The defendant admits the claims of the plaintiffs; denies that the estate has suffered any loss through his neglect; and avers that the mortgage debts of the estate being paid, there remains no funds to be distributed among the ordinary creditors; that there are notes amounting to three thousand three hundred and forty-one dollars, for which he is not accountable, because some of these have never come to his hands, and the amount of others, subscribed by himself, is due to him as a mortgage creditor. To this answer is annexed a statement or account, if it can be so called, from which it is difficult to collect any thing, except that the defendant has set himself down as a mortgage creditor for three thousand six hundred dollars in capital, and one hundred and seventy dollars for interest due thereon. The judgment below allowed the whole of defendant's claim, and the plaintiffs have appealed.

This case has been submitted to us without argument or brief, and the record, by agreement of counsel below, has been made to consist of a number of loose documents, on separate sheets of paper, numbered and marked as per said agreement. From these we have been enabled to reach the following facts, to wit: That on the death of P. L. Gwinn his estate was first administered upon by one Thomas Bryan, who offered for sale certain slaves, which were adjudicated to defendant for the sum of three thousand and twenty-five dollars; that these slaves had been purchased by Gwinn, from the estate of Mrs. Elizabeth Bowden, for three thousand six hundred dollars, for which he had given his notes, signed by defendant as his security, and secured by a mortgage on the slaves. The evidence shows, that defendant has taken up the notes subscribed by Gwinn, and has thus been subrogated to the vendor's mortgage on the slaves adjudicated to him, as above stated, for three thousand and twenty-five dollars. Having afterwards been appointed administrator of Gwinn's estate, he had certainly a right to place himself in his account as a mortgage creditor for three thousand and twenty-five dollars, the price brought by the slaves mortgaged

to him; for the surplus, defendant should have been placed among the ordinary creditors. The judge below has entirely overlooked the other matters submitted to him; in fact, the whole proceedings are lame, and must be considered *ex parte* as to the other creditors. The property of the estate is not yet all disposed of, nor are the debts collected. The account can be viewed only as a provisional one; we think, however, that, so far as it goes, the judgment below is erroneous in allowing the whole of defendant's claim as a mortgage debt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed. And it is further ordered, adjudged and decreed, that the account presented by defendant be so amended as to reduce his mortgage claim to three thousand and twenty-five dollars, leaving the other matters, presented by the pleadings, to be hereafter settled, contradictorily with all the creditors, in the rendition of a final account, and defendant pay costs in both courts.

BOONE *vs.* SAVAGE.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CARROLL, THE JUDGE THEREOF PRESIDING.

Where the plaintiff in attachment, sets forth in his affidavit that the sum claimed in the petition "*is justly due him*," and the petition states that "the defendant is *indebted to him*" in this sum, the affidavit is sufficient.

The articles 42 and 43 of the Louisiana Code, only provide for a change of domicil, by persons already residents of the state, and not those coming from another state.

It requires a *residence* of one year in this state, by persons coming from another state, to acquire a domicil. Until then they are liable to be sued by attachment, as *non-residents*.

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This is an attachment suit against the defendant, as maker of a promissory note, in the parish of Carroll, for one thousand one hundred and sixty-five dollars and twenty-four cents, payable to the plaintiff the 1st January, 1838; and also as the drawer of a bill of exchange, payable to the order of plaintiff, dated at Rodney, Mississippi, January 28, 1836, for one thousand nine hundred and eighty-seven dollars and sixty cents, drawn on and accepted by Bogart & Hoops, of Port Gibson, payable the 10th February, 1837. The plaintiff claims interest at the rate of eight per cent. per annum, (the rate allowed by law in Mississippi,) together with damages and costs of protest. He further states, that the defendant resides permanently out of the state, but has property within it, which he prays may be attached, &c.

The plaintiff made affidavit "that the sum of three thousand one hundred and fifty-two dollars and eighty-four cents, *and the interest as set forth in the foregoing petition*, is justly due him; and that the defendant, John H. Savage, resides permanently out of the state, &c."

The attorney appointed to represent the absent defendant, moved to dissolve the attachment on the following grounds:

1. Because the affidavit on which it issued is not made according to law, as it does not allege that any sum or sums of money are due by defendant to plaintiff.

2. The attachment was sued out, when, in fact, the defendant is a citizen of the parish of Carroll, where suit is brought.

The suit was instituted the 4th April, 1838. A declaration of the defendant before the parish judge of Carroll, was produced, dated the 4th December, 1837, in which he elects and declares his domicil, for the future, to be in that parish, having lately resided in Mississippi.

The evidence showed that the defendant is the owner of a plantation in the parish of Carroll, and that he is frequently there; that he claims to reside there, having had his family with him on his plantation.

The judge presiding was of opinion the affidavit was insufficient. It was not specific in stating that the defendant was indebted to the plaintiff in the sum set forth, which was required.

On the second head, the judge deemed the attachment insufficient. "Although," says he, "the property of the debtor may be attached in his possession, as appears to be the case here, yet it is the evident design of the attachment law that this process should run against the debtor's property in the hands of third persons, *Code of Practice*, 139 *and* 242; and the legislature probably did not intend that it should go against property in the debtor's possession, except where he is upon the eve of leaving the state forever; or when he conceals himself to avoid being cited. *Code of Practice*, 243."

Judgment was rendered dissolving the attachment, and the plaintiff appealed.

Selby for the plaintiff.

Copley and *Dunlap*, contra.

Strawbridge, J., delivered the opinion of the court.

This suit commenced by attachment. A motion was made to dismiss the attachment; 1st, on the ground that the affidavit was insufficient; and 2d, that he was a resident of the parish. The affidavit is in the following words: "C. Boone, the foregoing petitioner, sworn, says, that the sum of three thousand one hundred and fifty-two dollars and eighty-four cents, and the interest, as set forth in the foregoing petition, is justly due him, and that the said J. H. Savage resides out of this state," &c.

I. The petition sets forth, "that John H. Savage, residing in Jefferson county, state of Mississippi, is indebted to petitioner in the sum of three thousand one hundred and fifty-two dollars and eighty-four cents," &c. The affidavit is written at the foot of the petition. We think it is sufficiently certain.

II. On the score of residence, it is shown that the defendant is a practising physician in Rodney, Mississippi; that his family resides in Rodney, where he is usually to be found; that he is a house-keeper there, and his family is now there. He has a plantation and slaves in the parish of Carroll,

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which he has often visited for some years past, spending several days at a time, and that once his wife spent a week on this plantation. It is further shown, that in December, 1837, the defendant went before the parish judge of Carroll, and declared that he elected that parish as his domicil and future residence.

The articles 42 and 43 of the Louisiana Code only provide for a *change* of domicil by persons already residents of the state, and not those coming from another state.

The articles 42 and 43 of the Louisiana Code, referred to, only provide for cases of a *change* of domicil by persons already residents of the state. The present case is that of a person resident in another state, attempting to acquire a residence here. On this subject a law was passed in 1816: See 2 *Moreau's Digest, verbo* "*Residence*," 308. It declares that a "residence within the state shall not be considered as acquired until the individual coming into the state shall have remained within the same for twelve months following the date of his notice to the judge," &c. And a second act passed in 1818, (2 *Moreau's Digest*, 309,) alters, in some respects, the previous requisites, but still requires a residence of one year.

It requires a *residence* of one year in this state by persons coming from another state, to acquire a domicil. Until then they are liable to be sued by attachment, as *non-residents*.

It is already seen that the defendant's declaration was made in December, 1837, and this suit was instituted in April following.

If we take the law of 1818 as our guide, still the residence of one year is not shown.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, dissolving the attachment, and dismissing the petition, be annulled, avoided and reversed; that the cause be remanded, with order to reinstate the petition and attachment, and to proceed therein according to law; the appellee paying the costs of the appeal.

CROSSMAN ET AL. *vs.* VIGNAUD ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE SEVENTH PRESIDING.

An open space had been used as an alley, or public street, in the town of Natchitoches, for upwards of thirty years, but was not shown to have been designated as such on the plan of the town, or by any destination to public use: *Held*, that it remained private property, and, as such, was held by the defendant's title.

The right of passage, and to use an open space in a town as a public alley or street, is not acquired by prescription. It is an interrupted servitude, which requires the act of man to be exercised, and can be established only by a title.

This case commenced by injunction. The plaintiffs allege that the defendants were preparing and about to stop up a public alley or small street in the town of Natchitoches, situated between their property and a piece of ground in the possession of the Branch Bank of the City Bank of New-Orleans; that said alley has been an open and public highway for thirty years, and that the corporation of Natchitoches, by its legal and authorized agents and officers, has been accustomed, for more than thirty years, to keep this street in repair, &c. They allege that, by shutting up said alley, their property will be injured to the amount of two thousand dollars; and therefore pray for an injunction, prohibiting the defendants from proceeding to close up said street or alley, and for judgment, with damages.

The defendants pleaded a general denial; and the defendant, Vignaud, avers that there is no public alley or street, as claimed by the plaintiff, but that the City Bank, of which he is cashier, owns the lot and ground claimed as public, which they purchased at public sale, of the property of Charles Pavie, bounded below by the plaintiff's store, and above by another lot of the said Pavie; that he employed his co-defendant to fence in the whole boundary of said space of ground for the Bank, until he was stopped by the injunction.

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He avers that there is no public street between the Bank and the plaintiffs, as is alleged; and that the corporation of Natchitoches disclaims any right whatever to a public passage or street there, &c. Upon these pleadings and issues the cause was tried before the court and a jury.

The evidence, consisting mainly of the testimony of witnesses, old inhabitants of the town, showed that an alley or passage had existed in the vacant space in dispute for more than thirty years; in fact, the defendants admitted it had been open and used as such in passing for forty years. One witness deposed that houses had been built fronting on this open space. The whole space measures nineteen feet; but the plaintiffs' lot and defendants' (or bank lot) adjoin, and are situated alongside of each other, the bank having fourteen feet of this space and the plaintiffs' five feet, according to their measured boundaries.

It was shown that the corporate authorities of the town of Natchitoches disclaimed any right to a public alley or street in the vacant space in contest between the parties. There was no plan or designation of this space, as a public alley or street, produced in evidence.

The jury returned a verdict for the plaintiffs, prohibiting the defendants from closing up the alley in controversy, and ordering it to be kept open as a public alley of the town. From judgment confirming this verdict, the defendants appealed.

Brent and *Morse*, for the plaintiffs.

1. The legal question to be decided in this case is, was the land in dispute a highway, or street, in the eye of the law? The evidence shows that it has been used as a public highway for thirty-three years or more.

2. We hope to sustain this injunction by the weight of Judge Martin's dissenting opinion in 5 *Louisiana Reports*, 145, sustained and approved by the Supreme Court of the United States, in the case "City of Cincinnati *vs.* White's Lessee," 6 *Peters*, 433, and in the case "New-Orleans *vs.* United States," 10 *Ibid*, 712.

3. The defendants show title for the land, but we contend, in obedience to the principles laid down by the authorities, that we have shown enough to entitle us to recover. We have shown that this has been a public alley or passway for thirty odd years; that the owner, residing in the parish during all that time, never objected, or dissented from the use made of it; that houses have been built along it, and with reference to it; that vested rights have been thereby acquired; and, in fine, that there has been such an implied dedication of it to public purposes, that it can no longer be the subject of private ownership.

Campbell and *Dunbar*, for defendants.

Strawbridge, J., delivered the opinion of the court.

The Branch of the City Bank of New-Orleans and the plaintiffs are owners of two contiguous lots in a square of the town of Natchitoches. On the dividing line is an open space, or alley, of nineteen feet in width, five feet of which covers part of the plaintiff's lot and fourteen that of defendants. For thirty or forty years this has been open and used by the public as a passage. On one corner is the banking house, and on the opposite the store of the plaintiffs, in the rear of which they have built a warehouse fronting on the alley. In 1836, the bank directed the defendant, Vignaud, who is their cashier, to inclose that part of the alley lying on their ground, to prevent which the plaintiffs obtained an injunction, on the allegation that it was a public passage, the stopping of which would prejudice the public rights, and deteriorate their property. The cause was tried by a jury, who rendered a verdict for the plaintiffs. A new trial was granted, and a second verdict rendered for the plaintiffs, and judgment given thereon, from which this appeal is taken.

The plaintiffs contend for the affirmance of this judgment, on two grounds: first, that the alley, being left open to public use, is, by its destination, public; second, that the defendants, having acquiesced in the passage by the public, and suffered the plaintiffs to build thereon without setting up

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their title, have lost their right, if any they ever had. We think neither of these positions tenable.

In support of the first, they have referred us to the cases of the City of Cincinnati *vs.* White's Lessee, 6 *Peters*, 435; Mayor, &c., of New-Orleans *vs.* the United States, 10 *Ibid*, 712, and the opinion of Judge Martin, in the case of De Armas *vs.* the City of New-Orleans, 5 *Louisiana Reports*, 132.

An open space had been used as an alley or public street in the town of Natchitoches, for upwards of thirty years, but was not shown to have been designated as such on the plan of the town, or by any destination to public use: *Held*, that it remained private property, and, as such, was held by the defendant's title.

Had the plan of the town of Natchitoches (a portion of which is in evidence) exhibited this space as an open lane, or had the primordial titles so treated it, these cases would have applied; but it is admitted that the defendants have shown a good title to fourteen feet. The town surveyor deposes that no such space has been marked on the plan; that, though all the other streets have been named, this has been nameless; and it is shown by the act, or deed, under which the plaintiff holds, that the boundary given is the defendant's line, thus including the remaining five feet of the alley in his lot. These circumstances, so far from showing any destination to public use, leave on our minds the conviction that the property was private, and that this case does not fall within the rule invoked.

It remains to be seen whether the plaintiffs or the public have acquired, or the defendants and those under whom they claim have lost any rights to the property; and here, be it remarked, that the house or houses fronting on the alley do not touch the common line: they front on the line of the alley, and are consequently five feet within plaintiff's limits. What power the defendant has to prevent the plaintiff from building within his own limits, or what obligation he could be under to inform him of their reciprocal rights when the title of the latter called for his line, and of course told him the ground on the other side of that line belonged to the defendant, we cannot perceive. If he, or if the public could acquire a right of passage thereon, it must be by some grant of the defendant; some forced expropriation made under legal formalities, and for a compensation fixed and paid, or by prescription. Neither of the first are pretended, and we

The right of passage, to use an open space in a town, as a public alley or street, is not acquired by prescription. It is an interrupted servitude which requires the act of man to be exercised, and can be established only by a title.

think, with the defendant's counsel, the question is, have the plaintiffs (*i. e.* the public) made out a right of passage by prescription? The Louisiana Code, article 723, declares, "Interrupted services are such as need the act of man to be exercised; such are the rights of passage, of drawing water, pasture and the like." Article 762 provides, that "continuous non-apparent servitudes and interrupted servitudes, whether apparent or not, can be established only by a title." "Immemorial possession itself is not sufficient to acquire them."

We pass over that part of the case which presents an attempt to make out a title by resolutions of the trustees of the town, passed since the institution of the suit, declaring that this and other spaces shall be and remain public; directing the surveyor to make out a new plan, and to mark them thereon, as destined to public use; giving a name to it, as had been done to other streets, &c., with the remark, that if the suit was not well founded in its origin, such measures cannot mend it. They are not known to our laws, as modes of divesting private rights. If the property in question be necessary to the public service, a course of proceeding is provided by which it can be obtained, and none other will avail.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled; and that the injunction be dissolved and the defendants quieted in their possession; and that the plaintiffs pay costs of both courts.

KERR *vs.* KERR ET AL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF CARROLL.

Where the widow sues to recover certain property under her marriage contract, which she alleges was given to her by her husband, but is withheld and sold by the administrator and heirs: *Held*, that it is an

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action to recover property *under a title*, and not a partition, and the Probate Court is without jurisdiction.

Where the court is without jurisdiction *ratione materiæ*, no consent can give it, and the court is bound to notice it *ex officio*, even when no plea to the jurisdiction is filed. 7 MR 274

The plaintiff, who is the surviving widow of General Joseph Kerr, deceased, alleges that, by a marriage contract between them, she is entitled to certain property remaining in the succession as her own separate property, but that the defendant, James D. Kerr, administrator and son of the deceased, advertised all the property (including that claimed by petitioner) for sale. She alleges, that all these proceedings are illegal, and prays that the administrator and heirs of General Kerr be cited, and that she have her property partitioned and set off contradictorily with them. She annexes the marriage contract, which designates the property she claims.

The defendants averred that the property had been sold and passed into the hands of a third possessor; and that she could not recover on the marriage contract, for sundry reasons which are stated.

The inventory of the estate of Joseph Kerr, deceased, showed that it consisted of land valued at ten hundred and forty dollars, and the balance in stock, farming utensils, &c.

On the trial, the probate judge was of opinion that the suit involved title to real property, which he was without jurisdiction to try, and dismissed the suit. The plaintiff appealed.

Selby, for the plaintiff, insisted that this was a suit for a partition, by the widow against the administrator and heirs of Kerr, deceased, to have her own separate property set off to her, and is properly brought in the Probate Court. It is emphatically an action for the partition of a succession, still in a process of administration, and contradictorily with the heirs. *Code of Practice*, 924, *No.* 14—1021.

2. This suit is to annul the proceedings in the Probate Court, as irregular and illegal, and is properly brought in

that court. The Probate Court has authority to annul a decree which it has rendered. 8 *Martin, N. S.*, 518. 1 *Louisiana Reports*, 18.

3. The administrator has not yet rendered any account, and all the property of the succession is still in the Probate Court, and subject to its action on all claims against the succession. *Code of Practice*, 996. 10 *Louisiana Reports*, 425.

Copley, for the defendants.

Morphy, J., delivered the opinion of the court.

The plaintiff alleges that she is the widow of Joseph Kerr; that, by her marriage contract, her said husband settled on and donated to her certain immoveable property therein described; that the defendant, having been appointed administrator to her said husband's estate, has advertised for sale the property thus belonging to her, together with the other property of the deceased; that no inventory has been made; that all the proceedings are irregular and void, and that the defendant has no right to sell her said property. She concludes with a prayer that the aforesaid property be not sold, but be partitioned and assigned to her as her own, by the decree of the court. The defendant, and the other heirs at law of the deceased, aver that the property claimed has been sold, and has passed into the hands of third persons; and they set up divers other matters of defence, all tending to deny her title to the property.

Under these pleadings, the judge *a quo* refused to pass on the merits of the issue placed before him, and, from this refusal, the plaintiff appeals.

It is evident that the plaintiff's object is to recover certain property, and not to obtain a partition, as contended for. It is also clear that the Court of Probates cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally for certain purposes. No plea to the jurisdiction was made by the defendants, but the want of jurisdiction in this case being *ratione materiæ*, no consent could give it, and the judge was bound to notice it *ex officio*. *Code of Practice*, 925. 3 *Louisiana Reports*, 514.

Where the widow sues to recover certain property under her marriage contract, which she alleges was given to her by her husband, but is withheld and sold by the administrator and heirs: *Held*, that

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it is an action to recover property *under a title*, and not a partition, and the Probate Court is without jurisdiction.

Where the court is without jurisdiction *ratione materiæ*, no consent can give it, and the court is bound to notice it *ex officio*, even when no plea to the jurisdiction is filed.

An attempt has been made to show that this is, in fact, an action to annul all the proceedings that had taken place. We find in the petition an allegation to that effect, but there is no corresponding prayer for the nullity of the proceedings, except as relates to the sale of the property claimed. We infer from the whole tenor of the petition, taken together, that the allegation of the nullity of all the proceedings was merely incidental to the principal demand, to wit, the recovery of the property. We are of opinion, that the court below did not err in declining jurisdiction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

FORT *vs.* CORTES AND LAPLACE.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE DISTRICT PRESIDING.

Where a note is made payable at a particular place, payment must be demanded *there*, before a recovery can be had against the sureties in the note.

It is not sufficient to show that the sureties had no funds in the place of payment to meet the note at maturity, in order to charge them; for it was incumbent on the maker of the note, *not on them*, to provide funds at its maturity.

The sureties in a note may oppose to the action all the exceptions allowed to the maker, and which are inherent to the debt.

This is an action against the defendants, who signed a promissory note with one William Harkins as his sureties, payable "at the counting-house of Messrs. Robbins & Painter, of New-York." The defendants pleaded a general denial, only admitting their signatures as security for Harkins.

There was no proof of a demand of payment at the place designated in the note, although it was alleged in a supplemental petition. A bill of exceptions was taken to the decision of the court, allowing proof of demand made on the defendants.

The following interrogatory was propounded to the defendants, which was ordered to be answered in open court, but was not:

"Had you any funds, at the maturity of the note sued on in this case, in the house of Robbins & Painter, of New-York; and if you had, were there funds of yours sufficient to meet said note?"

This interrogatory not being answered, the plaintiff prayed to have it taken for confessed. Parole evidence was offered of demand made on the defendants, to which demand they made no objections.

There was judgment against the defendants, and they appealed, after an unsuccessful attempt to obtain a new trial.

Brent and *Winn*, for the plaintiff.

1. It was admitted in argument that the defendants were securities of Harkins, but this was only to repel the idea which seemed to be entertained that they were endorsers on the note sued on. They were securities of Harkins, but this securityship was a contract only between themselves. As regards the plaintiff in this case, they were all principal obligors, and as such bound equally to him, and *in solido*. The note is worded, "I promise to pay," and signed by Harkins, Cortes and Laplace. It is therefore a note *in solido*, and all who have signed are drawers and principal obligors, and bound *in solido*. 2 *Louisiana Reports*, 62.

2. The principle established, is, that in obligations *in solido* all the debtors are principal obligors as regards the creditor (*vis-a-vis du créancier*), no matter what private relations may exist between the debtors as among themselves. It would certainly be a new principle to impose different obligations on co-obligors bound *in solido*, and by the same contract. 1 *Pothier on Obligations*, *No.* 264.

3. This, then, was a note *in solido*, and the parties do not stand in the light of securities, so far as the creditor is concerned. Like all other obligors *in solido*, they are principal obligors, (*vis-a-vis du créancier*,) and were each singly and collectively bound to do every thing stipulated in the obligation. One was no more bound than the other, being all principal obligors; and it is at the option of plaintiff to proceed against any particular one, and let the others alone.

Campbell, Carr and *Pierson*, for the defendants, insisted that there was no demand of payment made at the place where the note was made payable, and the want of it is fatal to a recovery against the defendants.

2. Demand of payment at the place designated in the note, must be shown, and cannot be dispensed with; it is a pre-requisite to a recovery. 3 *Martin, N. S.*, 423. 2 *Louisiana Reports*, 318. 10 *Ibid.*, 552. *Bailey on Bills*, 129.

Morphy, J., delivered the opinion of the court.

The defendants are sued as security of William Harkins, the drawer of a promissory note in the words and figures following, to wit:

"Natchitoches, April 15th, 1836.

"On the first of October next, I promise to pay to the order of Mr. William Fort, four thousand eight hundred and sixty-two dollars, for value received, payable at the counting house of Messrs. Robbins & Painter, of New-York.

(Signed) "WILLIAM HARKINS.
(Signed) "CORTES & LAPLACE,
"Security."

The judgment below was in favor of the plaintiff, and the defendants, Cortes & Laplace, after an unsuccessful attempt to obtain a new trial, have taken this appeal.

It is admitted that no demand has been made at the place appointed for payment in the body of the obligation. The plaintiff, to supply the want of such demand, has endeavored to prove that the maker, Harkins, had provided no funds at that place, by putting interrogatories to the defendants. They

have been asked whether, at the maturity of the note sued on, they had sufficient funds in the house of Robbins & Painter, of New-York, to pay the note. They made no answer; and, allowing the plaintiff the full benefit of the presumed confession that defendants had no funds to meet the payment in New-York, it will in no way help him, for it was incumbent on the drawer of the note, not on them, to provide the necessary funds; and nothing in the record establishes any failure or neglect of the drawer so to do. A witness was also produced to establish that payment was often demanded of the defendants, and that they never objected to the demand being made here. The same remark applies to this testimony: if a demand made here, without objection, could produce any waiver of the maker's rights, it must be a demand on him, not one made on the defendants. Throughout these proceedings, the latter appear to have been considered as principal obligors, while they are only the sureties of Harkins; and, as such, they can oppose to the plaintiff all the exceptions belonging to the principal debtor, and which are inherent to the debt. *Louisiana Code, article* 3029. If the plaintiff is without right of recovery against Harkins, for want of a demand at the place appointed for payment, of which we entertain no doubt, he can have none against the defendants. *Mellon* vs. *Croghan.* 3 *Martin, N. S.*, 423.

It is not sufficient to show that the sureties had no funds in the place of payment to meet the note at maturity, in order to charge them, for it was incumbent on the maker of the note, *not on them*, to provide funds at its maturity.

The sureties in a note may oppose to the action all the exceptions allowed to the maker, and which are inherent to the debt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against plaintiff as in case of non-suit, the plaintiff and appellee paying costs in both courts.

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CECILE, F. M. C., *vs.* ST. DENIS, F. W. C.

CECILE, F.M.C., vs. ST. DENIS, F.W.C.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE SEVENTH PESIDING.

Where fraud is charged, direct and positive evidence is seldom to be obtained. Circumstantial evidence is commonly all that can be had; and every circumstance becomes material to ferrit out the fraud.

So, where interrogatories are propounded, which may appear immaterial, yet when fraud is alleged, the court is not authorized to dispense with having them answered, when they are not clearly improper.

This is an action to annul an act of sale, from plaintiff to defendant, of two negroes. The former alleges, he was induced, on the 4th of April, 1838, to execute an act of sale of two slaves, Henry and Mary, to the defendant, while in a state of intoxication, for the nominal sum of eleven hundred dollars, when they were worth two thousand dollars, and that said sale was fraudulently obtained from him by the defendant and her husband (*a statu liber*); that, at the time, she executed and delivered to him an instrument purporting to be her will, signed by her and two witnesses (Italians), in which she bequeathed or left the two slaves to him at her death, and at the same time took a lease from him, by which he was to pay her ten and twelve dollars per month each for hire. He prays that the said act be declared null and void, and that he be decreed to be the true owner, and quieted in his possession of the same. He then propounds sundry interrogatories to the defendant, concerning the payment of the price, which she answers, and declares she did pay the price stipulated, and negatives all fraud and collusion; and specially denies that the plaintiff was intoxicated when he executed the act of sale in question.

The defendant pleaded a general denial, and averred she purchased said slaves fairly, and that she is the true and *bona fide* owner of them, and prays to be quieted in her possession.

On the trial, the plaintiff offered his own affidavit, to show that a counter-letter had been executed by the defendant, in

the presence of two Italian witnesses, who signed; that, some time thereafter, one Jose del Hosté, who wrote it, called on plaintiff to let him look at it for a short time, promising to return it in an hour; that he gave it to del Hosté, who never returned it, but pretended he had mislaid it; that del Hosté has since absconded, and that he has been unable to procure said letter, but swears that it was obtained from his possession by fraud, and that it has either been destroyed or returned to the defendant.

This affidavit was offered to prove the existence and loss of the counter letter, to the introduction of which the defendant's counsel objected, but it was received by the court, and a bill of exception taken.

The cause was finally submitted to the court on the evidence adduced, and there was judgment for the defendant, quieting her in her title to the slaves; from which judgment, after an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

The cause was submitted to this court on written arguments, by Mr. Taylor, for the plaintiff, and by Mr. Campbell and Mr. Carr, for the defendant.

Strawbridge, J., delivered the opinion of the court.

The plaintiff complains that the defendant, by various pretexts, fraudulently obtained from him a conveyance of two slaves, of the value of two thousand dollars, he being intoxicated at the time; that the defendant executed a will, bequeathing said slaves to him, and also a lease, which were written by one Jose del Hosté, and signed by two witnesses; that, becoming sensible of his folly the following day, he called on the defendant, and desired the act might be annulled; that she promised to do this in a few days, and that he gave back the will and lease, the existence of which she now denies.

The answer of defendant denies these facts.

A supplemental petition was filed, in which the plaintiff required the defendant to answer certain interrogatories.

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The defendant moved the court to strike out the eighth and ninth of these interrogatories, on the ground that there was no allegation in the petition of the existence of a counter letter; and this the court ordered. There was judgment for the defendant, and the plaintiff appealed.

Though not clearly expressed, we understand the petition to state, in substance, that the will and lease were given by way of counter letter; and that the interrogatories were improperly stricken out.

As by an answer to a preceding interrogatory, the defendant had denied the execution of the will and lease, it might appear useless to require an answer to the two interrogatories in question; it is therefore proper to state the reasons which prevent us from coming to the conclusion that they were immaterial.

The fourth interrogatory is in these words: "Were or were there not two acts in Cecile's favor, executed by you, and were they not drawn by Del Hosté, and witnessed by two Italians?"

To this the defendant answers "No:" that she borrowed from del Hosté one hundred dollars; that when he was about starting for New-Orleans, he asked her for the hundred dollars, and she told him she had not the money, and gave him a note for it. Del Hosté told her he would make her an obligation for it, which she signed. Del Hosté then told her it was an obligation for the hundred dollars.

The eighth interrogatory is in these words: "Since Cecile passed the act to you for the sale of his slaves, have you seen the counter letter you gave Cecile?"

Ninth: "Do you know where they are?"

Where fraud is charged, direct and positive evidence is seldom to be obtained. Circumstantial evidence is commonly all that can be had; and every circumstance becomes material to ferrit out the fraud.

Where fraud is the charge, it is rarely to be made out by direct and positive testimony; it being a principal object to those who concocted it to avoid proof. Circumstantial evidence is commonly all that can be obtained, and every circumstance becomes material to ferrit it out. The very fact of a disinclination to answer any interrogatory is suspicious, for if the transaction be fair, there is nothing to conceal. True, the party has the right to object to improper questions,

and we cannot deprive him of it, but they should be clearly such.

That the paper she admits she did sign may, in her mind, have some connection with the matter in dispute, is evident; or why, after denying that she made a will and lease, qualify that denial by the history of a paper "which Del Hosté told her was an obligation for money due to him?"

And why object to answer whether she had seen the counter letter since the sale, or whether she knew where it was? if the answers to the fourth interrogatory were absolutely true, viz., that she had executed no such paper; for, if so, it would have been impossible that she should have seen that which never existed, or know where it was. We think the justice of the case requires it to be remanded.

So, where interrogatories are propounded which may appear immaterial, yet when fraud is alleged, the court is not authorized to dispense with having them answered when they are not clearly improper.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and avoided, and the case remanded for a new trial; that the defendant be required to answer the interrogatories; and that the appellee pay the costs of the appeal.

M'GUIRE *vs.* PECK.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE THEREOF PRESIDING.

A dilatory exception, taken *in limine litis*, may be pleaded in the beginning of the answer to the merits.

This is an action on a promissory note, against the maker thereof.

The defendant pleaded the want of an amicable demand, and averred that the suit was oppressive and illegal, as the plaintiff agreed not to sue, in consideration of the defendant

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having put into his hands certain promissory notes amounting to more than the demand sued on, which he promised to take in payment, and collect and pay over the surplus. He further avers, that the plaintiff is not the legal owner of the note sued on, and is not in any manner authorized to receive payment; that he has a valid defence against the original payee thereof, for payments made, &c.

In an amended answer, he propounded sundry interrogatories to the plaintiff, to answer under oath in open court, which were answered promptly and categorically.

At the second term of the court, the plaintiff's counsel moved to strike out the exceptions contained in the defendant's answer, as coming too late, after issue joined; to wit, the want of amicable demand, and the prematurity of the suit; which motion was sustained by the court, on the ground that, being a dilatory exception, it could not be pleaded in an answer to the merits, or after a judgment by default. The defendant took his bill of exceptions.

There was judgment for the plaintiff, and the defendant appealed.

M'Guire, in propriâ personâ.

Copley, contra.

Martin, J., delivered the opinion of the court.

The defendant and appellant has placed his case before us, on a bill of exceptions to the opinion of the court, in ordering the part of his answer which relates to the amicable demand and the pre-maturity of the suit to be stricken out, on the ground that the exception was a dilatory one, and could not be pleaded in an answer to the merits, or after a judgment by default.

A dilatory exception, taken *in limine litis*, may be pleaded in the beginning of the answer to the merits.

The record does not show that any judgment by default had been taken, and it appears that the exception was taken *in limine litis*, being placed in the beginning of his answer.

The court, in our opinion, erred in ordering this part of the answer to be stricken out.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the parts of the answer stricken out be reinstated, and the case remanded for further proceedings, according to law; the plaintiff and appellee paying the costs of the appeal.

BURLAND *vs.* CARROLLTON BANK.

APPEAL FROM THE COURT OF THE NINTH JUDICIAL DISTRICT, FOR THE PARISH OF CARROLL, THE JUDGE THEREOF PRESIDING.

Where the allegations in the petition are vague and insufficient, they may be rendered certain by the averments in the answer, and evidence admitted under them, in aid of the plaintiff's case, which would have been excluded for want of proper allegations.

A sale, having all the forms of a legal sale by authentic act, cannot be treated as a nullity, even if fraud is alleged.

This suit commenced by injunction. The plaintiff claims to be the owner of a tract of land in the parish of Carroll, with the improvements thereon, which he purchased from one James B. Rusk, in 1837, and that he has been ever since in possession and paid the taxes thereon. He further shows, that the sheriff of Carroll has levied an execution on said land, in virtue of a judgment of the Carrollton Bank against said Rusk, and is about to sell the same. He prays that the Carrollton Bank and the sheriff be enjoined from proceeding any further against said land, and that the injunction be made perpetual. The counsel for the bank pleaded a general denial, and prayed that the injunction be dissolved, with damages and costs.

The evidence showed that, on the 2d December, 1837, James B. Rusk sold and conveyed, by notarial act, the land

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and improvements under seizure to the plaintiff, for twenty-four thousand five hundred dollars, payable in four instalments.

The Carrollton Bank obtained judgment against Rusk for eleven hundred dollars, and execution issued the 22d November, 1838, and was levied on the premises in question. This seizure was nearly twelve months after the sale and transfer of the property by Rusk to the plaintiffs in injunction.

The district judge rendered judgment for the plaintiff, perpetuating his injunction, and the defendant appealed.

Stacy, for the plaintiff.

Selby, for the defendant.

Morphy, J., delivered the opinion of the court.

The defendants appear before us as appellants from a judgment maintaining and rendering perpetual an injunction sued out by the plaintiff, to prevent the sale of a tract of land belonging to him, and seized to satisfy a judgment obtained by the defendants against one James B. Rusk, their debtor. They contend that the plaintiff's petition, praying for an injunction, is vague and insufficient; that, under its allegations, no evidence could be received to prove the seizure of plaintiff's property. It cannot be denied that the petition has been drawn up with great looseness and want of precision, but the defendants, in their answer and other pleadings, having been sufficiently technical to secure their damages in case of success, whatever may be vague in the plaintiff's allegations, is rendered certain by the averments of defendants, and they exhibit the not very uncommon occurrence, in our courts, of one party unconsciously assisting his adversary. We think that, under all the pleadings, as presented by the record, the material parts of the evidence have been properly admitted. We must, however confess that we do not well understand how it can have been the interest of the defendants to resist the introduction

Where the allegations in the petition are vague and insufficient, they may be rendered certain by the averments in the answer, and evidence admitted under them in aid of the plaintiff's case, which would have been excluded for want of proper allegations.

of evidence to prove the seizure complained of by the plaintiff. The injunction stays the proceedings of defendants, in their suit against Rusk, their debtor, only in relation to this property of the plaintiff: if no seizure of it had taken place, there was nothing for the plaintiff to enjoin. The defendants would not appear to have been estopped, and therefore, in case of a dismissal of the plaintiff's petition, no damages could have been awarded them, as prayed for in their answer.

A sale, having all the forms of a legal sale by authentic act, cannot be treated as a nullity, even if fraud is alleged.

As to the merits, the plaintiff has proved that he is the owner of the property seized by virtue of an authentic act executed before the seizure. The sale to plaintiff cannot be treated as a nullity, and his property cannot be seized to satisfy a judgment against his vendor, even in case of fraud, which is not alleged here; although some testimony is to be found in the record, tending to establish it. The defendants would be obliged to resort to the action which the law gives to creditors, to set aside sales made by their debtors, with a view to defraud them. 5 *Martin, N. S.*, 361.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

THE STATE *vs.* FRITH ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF AVOYELLES, THE JUDGE OF THE SEVENTH PRESIDING.

Where a bail bond is taken in pursuance of an order of court; the entry on the minutes requiring bail in seven hundred dollars, when the bond is taken in the penalty of seven thousand dollars; and the judge, at a subsequent term corrects and alters the minutes to seven thousand dollars: *Held*, That the bond is not thereby invalidated; and the sureties can only be relieved on the score of error in signing

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it, which does not result from altering the minutes whether done legally or illegally.

The sureties in a bail bond are not entitled to an *exoneratur* when they have made no formal surrender of the principal; even if he be confined in prison for a subsequent offence not bailable, and afterwards makes his escape.

So, also, bail are not exonerated when they have made no surrender of the principal, even where the sheriff and coroner both resign; for these officers are required to act until their successors are appointed.

This case comes up from a judgment on a bail bond against the principal and his two sureties, taken in the penal sum of seven thousand dollars.

The defendant, Archibald Frith, was indicted for stabbing with the intent to kill and murder one S. Read, and gave bail in the sum of seven thousand dollars, with two sureties.

In entering up the judge's order requiring bail, it was written seven *hundred* dollars, but the sheriff took bail, and the principal, with his two sureties, signed a bail bond for seven thousand dollars. It was afterwards, at the next term, suggested to the judge presiding, that there was a clerical error in entering the order of bail on the minutes of the court and he ordered the word *hundred* to be stricken out, and the word *thousand* written over it, which made it read seven thousand instead of seven hundred dollars.

While out on this bail bond, Frith was arrested and committed to jail for the murder of one John Dorman, in June, 1838. During his confinement, and before any indictment was found, he broke jail, and made his escape. At the October term, 1838, of the Avoyelles District Court, Frith and his bail were called out on their recognizance, made default, and a judgment *ni. si.* entered; which was to be made final at the next term of the court, *unless* the defendants should show cause to the contrary.

The defendants filed their answer to the next term, and resisted the final judgment on the following grounds:

1. The bail bond signed by them could have no legal effect, inasmuch as there was no legal order of court, or any competent authority for taking such an obligation. The order

requiring a bail bond, was for the sum of seven hundred dollars, as appears from an inspection of the minutes, or records of the court. The records showed this for six months after bond was taken until they were illegally altered by the court, and that this alteration is illegal, and was made without notice to them, and without their knowledge.

2. If the bond is legal and binding, it can only be for seven hundred dollars, agreeably to the original order of court under which it was taken.

3. The state cannot recover on this bond, because the principal was arrested and confined in prison, charged with the crime of murder, which made him no longer bailable: The defendants were, therefore, entitled to have an *exoneratur* entered.

4. The existence of the fact that the principal was confined in jail for a crime which was not bailable, is so absolutely inconsistent with the obligations of the bail bond, as to vitiate and supersede its legal operation. The prisoner could not be in the custody of his sureties, and confined in close jail for an offence not bailable.

5. The fact of being imprisoned for an offence not bailable, the motive or inducement for giving bail in the first instance ceased from that moment.

6. They are discharged by operation of law, because both the sheriff and constable resigned, and they were precluded from making a formal surrender. In fact it was impossible, when there was no officer to whom it could be made.

For all these grounds and causes they pray to be discharged, and for judgment discharging them with their costs allowed.

Upon these issues the cause was tried. The district judge rendered judgment *in solido*, against A. Frith, principal, and F. Cullum and T. Mills, his sureties, in the sum of seven thousand dollars; from which the defendants appealed.

Brent, and *O. N. Ogden* (District Attorney,) argued on behalf of the state, and contended that the error in the entry on the record was merely clerical, and the court had a right

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to correct it. There is a distinction between amending these mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk, and are mere clerical mistakes. *Tomlin's Law Dictionary, vol.* 1, 71, 74. *Cowper's Reports*, 699.

2. The order of the court requiring bail, was merely directory to the sheriff, and communicated in fact *ore tenus* by the judge to that officer. The sheriff was not obliged to inspect the minutes to know how the order was entered, nor was it necessary that a copy should be served on the accused; and no notice of any irregularity in the entry of this order was taken before signing the bond, and not until after its condition was broken; consequently, the defendants knew nothing of the manner in which it was entered, and it made no part of the condition or basis of the obligation of the bond. There was no error to invalidate the contract entered into by signing the bond.

3. There is a curious fact presented by the record, which shows the entry of the clerk to be purely an error in writing up the order of court, requiring bail of the principal and his accessories. The sum of seven hundred dollars only was exacted from the principal, according to this order, when the accessories were required to give bail in the sum of two thousand dollars each. This shows the error to be palpable in the entry; for a *nolle prosequi* was entered as to the accessories.

4. No irregularity in any of the proceedings anterior to the taking of the bond, nor any want of authority in the person taking it, can be pleaded, as detracting in any degree from its validity, and binding force and effect, for it is a settled principle of our law, that *as a man binds himself, even so is he bound.* 3 *Martin*, 565. 2 *Martin, N. S.*, 681. 5 *Ibid.*, 194. 4 *Ibid.*, 25.

5. The bond in this case was a *voluntary* obligation incurred by the obligors, and if the consideration of it be not illegal, according to our laws, it will be considered as *a law* in relation to the parties concerned. *Louisiana Code*, 1895.

6. Under no circumstances can the principal in this bond

be relieved from its obligations, because his non-compliance with its stipulations has resulted from his own act, and no man will be permitted to take advantage of his own wrong.

Hyams, for defendants, insisted, that no alteration of the record could be made, even with the view to correct an error. Judicial proceedings must be proven by the record, and not by parole; and courts of justice can only speak by means of their record. 2 *Starkie on Evidence*, 545, 571–2. Proof of public documents, such as records of a court, is by inspection. 1 *Ibid.*, 189. No collateral proof is admissible to impeach a record. 2 *Ibid.*, 705.

2. Where a deed or instrument is executed under some special authority, which prescribes the mode and form of execution, it will be invalid, unless all these requisites be pursued and observed. 1 *Starkie*, 322.

3. The bail should have been released as soon as the principal was confined to prison on the subsequent charge of murder. The courts in England universally give relief where the principal is in confinement by the act of the government, either by *habeas corpus* or *exoneratur*. They do not require a *habeas corpus* where it is inconvenient, but relieve by *exoneratur*. 13 *East's Reports*, 457–8.

Dunbar, *Bryce* and *Elgee*, also appeared for the defendants, and relied on the grounds set up in the answer or cause shown to the rule.

Martin, *J.*, delivered the opinion of the court.

This is a civil proceeding against sureties on their bail bond. They were regularly called on their recognizance at the proper term of court, and failed to appear. A judgment, *ni si*, was entered, and a rule taken to show cause why final judgment should not be entered up.

The defendants showed for cause, why judgment should not be entered on their recognizance for the appearance of the principal, who was charged with an assault and stabbing with an intent to commit murder, the following grounds:

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1. The illegality of the bail bond.

2. The state cannot recover, and the bail are entitled to an *exoneratur*, because they were disabled from surrendering the principal, in consequence of his close confinement in prison for an offence not bailable.

3. The sheriff and coroner having resigned, there was no officer or person to whom the bail could surrender the principal.

I. It is contended that the bond was illegal, because there was no order of court or any competent authority to take it; the order of court requiring a bond being for the sum of *seven hundred* dollars, as appears from an inspection of the record. That the records of the court, as they appeared for six months after taking the bond, exhibited the order of bail in the sum of seven hundred dollars only; and if this entry was afterwards altered or erased, it was done illegally, and without the knowledge or notice to these defendants; and if the bond is good for any sum, it can only be so for the sum of seven hundred dollars, agreeably to the order of court, or authority under which it was taken.

It appears from the record and evidence of the case, there was an order of court requiring the principal charged with the offence, to give bail for his appearance at court. The fact further appears that this order, as entered on the minutes of the court, directed the penalty of the bond to be in the sum of seven hundred dollars; and at the next term, the court ordered the entry to be amended, by the insertion of the sum of seven thousand dollars. The defendants had, in the meanwhile, given bond in the penalty of the latter sum.

Where a bail bond is taken in pursuance of an order of court, the entry on the minutes requiring bail in seven hundred dollars, when the bond is taken in the penalty of seven thousand dollars, and the judge, at a subsequent term,

Admitting the amendment of the order to be illegal, it cannot affect a bond which was given previously thereto. And if the defendants can be relieved at all, it must be on the ground of error. Nothing shows this to be the case. If there be no error, the bond must be valid for the sum mentioned therein. And when we consider the smallness of the sum of *seven hundred dollars*, demanded as a penalty from the principal offender, in an indictment for an assault with an intent to murder, in connection with the fact of two

thousand dollars having been demanded of the accessory, under the same charge; and also the circumstance of the principal and his sureties having signed the bond, with a penalty of seven thousand dollars, and likewise from the additional fact of the district judge making the amendment or alteration in the original entry, from seven hundred to seven thousand dollars, whether done illegally or not, we are forced to the conclusion that there was no error in the execution of the bond.

II. The bail are not entitled to an *exoneratur* in this case, because they have made no formal surrender. The principal being confined or imprisoned for an offence not bailable, did not prevent a formal surrender, which might have been made. The principal being in the custody of the sheriff, by a formal declaration to that officer, that the bail wished to surrender him, and did not consider themselves any longer bound for his appearance, they might have been exonerated.

III. In relation to the other ground relied on, the defence is equally untenable. The sheriff and coroner, even after having resigned, were empowered by law to act, and to continue their respective functions and duties until their successors were appointed. Their resignations, therefore, did not prevent the surrender of the principal offender into the custody of the law and its officers.

It can hardly be doubted that before the passage of the law by the legislature, requiring sheriffs and other officers to act after their term of service has expired, until their successors are appointed, or without it, the bail could not be discharged by the resignation of the sheriff and coroner; although it might be inconvenient, and their liability extended beyond their wish to retain the principal offender, until a new officer should be appointed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

corrects and alters the minutes to seven thousand dollars: *Held*, That the bond is not thereby invalidated; and the sureties can only be relieved on the score of error in signing it, which does not result from altering the minutes, whether done legally or illegally.

The sureties in a bail bond are not entitled to an *exoneratur* when they have made no formal surrender of the principal, even if he be confined in prison for a subsequent offence not bailable, and afterwards makes his escape.

So, also, bail are not exonerated when they have made no surrender of the principal, even where the sheriff and coroner both resign; for these officers are required to act until their successors are appointed.

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HARVEY.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE OF THE SIXTH PESIDING.

In actions of slander, when the words spoken are uttered with the intent to defame and injure the plaintiff in his business and livelihood, the law authorizes a recovery in damages for the injury sustained, without showing special damages.

The jury have no fixed rule in assessing damages in cases where the words are actionable. They may take into consideration the trouble and inconvenience which the plaintiff has been at in seeking relief, as making part of the injury sustained.

This is an action of slander. The plaintiff charges that the defendant, maliciously and wickedly, and with a view to defame and injure his good character, on or about the 15th day of July, 1837, and at many other times and places in public companies, did utter in substance, that your petitioner "*had counterfeited a bill of goods from New-Orleans;*" that he "had the bill in his possession, and can prove it to the satisfaction of any man;" also, "he (meaning petitioner) did counterfeit, or alter a bill of goods;" also, "James R. Guice has altered the amount of a bill; I have the bill, and can prove it to the satisfaction of any gentleman;" also, "he has altered the amount of a bill of goods; I have the bill, and can prove it;" also, "he did counterfeit or altered a bill, or a bill of goods received from New-Orleans, for me;" also, "Guice (meaning petitioner) has altered the figures on a bill of goods, and I will prove it;" also, "Guice has altered the face of a note, and I can prove it, for I have the note in my possession;" also, "he (meaning petitioner) is guilty of forgery; he has altered the amount of a bill of goods which he received for me from New-Orleans, and I will prove it;" and also, "I say he has committed forgery; I can, and I will prove it." The petitioner alleges that defendant did, on the 15th July last, and at many other times, make use of and publicly utter the said expressions and malicious charges, and with the malicious intent to defame his character, and

injure his good name and reputation; and he expressly alleges, that each of said expressions and charges are false, malicious and unfounded. Wherefore, and by reason thereof, he (the petitioner) has been damaged two thousand and five hundred dollars; for which he prays the verdict of a jury in his favor, and judgment thereon.

The defendant denies that he ever slandered plaintiff, as stated in his petition. He says, that in June or July, 1836, he deposited a sum of money with the plaintiff, to be sent to New-Orleans by some steam-boat, to buy certain articles of merchandize; that, on settlement, plaintiff presented him with a bill, purporting to be a bill of the goods, when, in fact, it was not such bill, but one made out by the plaintiff; and he then said the bill presented was not genuine, but was made or forged by the plaintiff or some other person, which he is ready to verify. He pleads a general denial to every other allegation in the petition.

Upon these pleadings and issues the cause was tried before a jury.

It appears the plaintiff resided at the steam-boat landing on the Ouachita river, where steam-boats were in the habit of landing goods for the neighbors and back settlers, and leaving them with him; and many times the bills of such goods were left with him, as well as bills of freight. In most cases he was in the habit of paying the steam-boats, and settling with the persons owing freight, &c. The expressions used were uttered and published by the defendant Harvey, and intended to apply to the plaintiff in relation to a bill of goods the latter had received for him.

Sterling, sworn, says he was present at the steam-boat landing, at the mouth of Bayou Bartholomew, in July last, together with others, when he heard defendant accuse plaintiff "*of forging a bill.*" Witness did not understand whether it was a bill of goods or freight, but that he also said "he had the bill in his possession and could prove it." Witness understood from plaintiff at the time he would not lie under such an imputation; and the only ground that defendant had for slandering him was, that he had

received goods for defendant and one Folk, and kept the original bill, and furnished defendant with a copy, so far as he was concerned.

Bartlett, sworn, says he heard defendant say that plaintiff "had altered a bill, either a bill of goods or freight bill, and he could prove it;" said, at another time that the plaintiff "had altered a bill of goods, and he would make him suffer for it." Witness understood defendant to mean that plaintiff had done this to defraud him.

Miller, sworn, states that he heard defendant, on the 15th July, say, that plaintiff had altered the face of a bill, and he could prove it to the satisfaction of any one.

Other witnesses testified that they had heard defendant say, that plaintiff had "*forged or counterfeited* a bill."

Defendant's witness explained the way in which he made the charge. Folk says, he had a keg of nails in a bill of goods for Harvey, the defendant; that plaintiff received them, and when he got his nails, the plaintiff made out separate bills in his own name, for witness and defendant, and kept the original bill to settle by; that this was the origin of the charge. Witness says defendant stated since, that the original bill was not the bill he charged the plaintiff with having forged; "that he was in possession himself of the bill that was forged, and no one should see it." This conversation took place since the suit was commenced.

The judge charged the jury "that they might find damages to the amount of the reasonable expenses of the suit, without any actual damage or injury having been proved." To this charge the defendant's counsel excepted.

The jury returned a verdict of four hundred and fifty dollars in damages for the plaintiff. From judgment rendered thereon the defendant appealed.

M'Guire, for the plaintiff, contended:

1st. The judgment is right, and should be affirmed. In actions of slander, special damage need not be proven, and may be implied by the jury. 2 *Louisiana Reports*, 74. 3 *Ibid.*, 207.

2d. The slander in this case amounts to a charge of a criminal nature, "altering or forging an account or receipt." 1 *Moreau's Digest*, 384, *section* 2. *Louisiana Code*, 1928.

3d. Every man is responsible for the damage he does, either intentionally, negligently, or by imprudence. *Louisiana Code*, 2294, 2295. 2 *Starkie*, 461, *and notes.*

4th. The judge properly charged the jury that they might find the expenses of the suit as special damages, but they did not find special, but general damages.

5th. Every allegation in the petition is fully supported by the evidence, and would sustain an action even at common law, amounting to a charge of crime, and being calculated to injure the plaintiff in his business of receiving articles at a steam-boat landing.

6th. The jury are the proper judges of the tendency to defame, by the words used, and the party using them are subject to the worst interpretation that can be put upon them, and cannot plead his own want of veracity to relieve him from the penalties of the law.

Downs and *Copley*, for the defendant, insisted, that no action would lie in this case, as there was no special damage shown; and the words proved to have been spoken, are not actionable in themselves. Where the party charged that the plaintiff swore to a lie, in relation to his testimony given on a trial, which implied swearing falsely, and the commission of perjury, yet, when it only related to the part of the testimony that was immaterial, it was held that the words were not actionable. 20 *Johnson's Reports*, 344, *and* 13 *Ibid.*, 81.

2. The words spoken must import some crime or offence for which the party might be punished criminally, to be actionable. In all other cases the party must prove a special damage. 4 *Bacon's Abridgment, title "Slander," letter L.* 483. 3 *Blackstone's Commentaries*, 118–119.

3. It is not sufficient to show that the defendant made use of such words, or to the like effect; but they must have a certain meaning and application. Now, the witnesses in this

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case say they do not know whether the bill spoken of, was a bill of goods or a bill of freight.

4. If the court should come to the conclusion that the words spoken are actionable, and tend to charge the plaintiff with an offence for which he might be indicted and punished, then the verdict and judgment of the court below must be reversed, and set aside, and the cause remanded on the bill of exceptions taken to the charge of the judge. See 11 *Louisiana Reports*, 238, 288.

Martin, J., delivered the opinion of the court.

This is an action of slander, in which the plaintiff charges that the words were spoken with the intent of injuring, and did injure him in his business and manner of getting his livelihood, which was to receive and forward goods coming from New-Orleans for the planters and people living in his vicinity, and for the back settlers; and also in collecting and paying freight and charges on the same.

The general issue was pleaded. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Our attention is drawn to a bill of exceptions taken to a part of the charge, in which the court instructed the jury, that they might give damages to the amount of the reasonable expenses of the suit, without any actual injury having been proved.

In actions of slander, when the words spoken are uttered with the intent to defame and injure the plaintiff in his business and livelihood, the law authorizes a recovery in damages for the injury sustained, without showing special damages.

The jury have no fixed rule in assessing damages in cases where the words

The appellant's counsel has contended, that in his address to the jury, he informed them that the plaintiff claimed no vindictive damages, and had brought the suit merely to establish that the charge made against him was malicious and false; and he would be perfectly satisfied with damages to the amount of the reasonable expenses incurred in prosecuting his suit.

In suits like the present, the law authorizes the plaintiff to recover, although he shows no special damage. The jury have no fixed rule in assessing the sum for which they are to give a verdict. They may take into consideration the trouble and inconvenience which the plaintiff has been at in seeking relief; for this is part of the injury which he sustains.

If the judge in his charge meant that the costs and charges of the suit were the necessary measure of damages, he erred; for the legal costs and charges must be paid in addition to the damages assessed. Believing, however, that he intended to convey the idea that the jury might give a compensation to the plaintiff for the trouble, inconvenience and expenses, which the defendant had wrongfully occasioned, we refrain from remanding the case, with directions not to repeat the charge. This would create unnecessary delay and costs; and probably would not produce a different result.

In cases in which damages are to be assessed without any being proved, those which result from the prosecution of the suit in procuring redress, are, perhaps, the plainest and most palpable ones, on which the attention of the jury can be fixed.

On the merits, the verdict of the jury being supported by the evidence, and the damages not complained of as excessive, the judgment cannot be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

are actionable. They may take into consideration the trouble and inconvenience which the plaintiff has been at in seeking relief, as making part of the injury sustained.

GILL *vs.* HUDSON.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, BEING THE SECOND APPEAL IN THIS CASE, GRANTED BY THE JUDGE OF THE FIFTH DISTRICT.

Where the record was not brought up and filed on the return day, nor within three judicial days thereafter, the court refused to sustain the appeal on the ground that the *delay* was caused by mistake of the appellant and his counsel, in supposing it had been filed by the clerk in proper time.

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This appeal was taken, returnable the *first* Monday of October, 1839, to the court, sitting at Alexandria. The record was not brought up and filed until Saturday of the first week of the court, which was the sixth judicial day of the term.

The counsel for the defendant and appellee moved to dismiss the appeal, as not having been filed on the return day, and within the time prescribed by law.

The plaintiff presented his affidavit, to show that the omission to file the new appeal on the return day, was caused by mistake; and prayed that it might be maintained as filed.

Dunbar, for the motion to dismiss.

Bryce, contra.

Martin, J., delivered the opinion of the court.

The dismissal of the appeal is prayed for, on an allegation that the transcript was not returned and filed in due time. The appeal was made returnable on the first Monday of October, 1839, and the transcript was not filed until the Saturday following, which was the sixth judicial day of the term.

The appellant has filed his affidavit, stating, that A. L. Bringhurst, as deputy clerk in the District Court, made out the transcript, and the affiant knowing that he was also deputy clerk of the Supreme Court, trusted that he would have had the transcript brought up, and timely filed. The affiant further states that he has been informed by his counsel, and verily believes, that they were under the impression that the transcript was regularly filed on the first day of the term. That the cause was fixed for trial, by agreement of counsel, under this impression. The affiant shows that this error was assisted and confirmed on the minds of the counsel on both sides by the fact that the same case was on the docket of this court at the last term, and was dismissed; that the old transcript being on file, and among the suits at the present term, misled the counsel, and induced the belief that the present appeal was regularly filed.

It does not appear that the appellant, or any of his counsel, took any steps to have the transcript filed in due time; and the circumstance of the deputy clerk of this court having made out the transcript for the clerk of the District Court, cannot be received as evidence of his having been requested to attend to the filing of it in this court.

The remainder of the affidavit which contains nothing within the knowledge of the affiant, must have very little weight with us; as it contains only matters within the knowledge of the appellant's counsel, in whose handwriting it appears to be drawn up. Those matters would have had more weight if they had been sworn to by the counsel.

It appears to be conceded in the argument, that the appellee's counsel did not agree to have the case set down for trial, but were silent when the appellant had it fixed for hearing.

It also appears to us, that before the return day, and the meeting of this court, the clerk of the District Court having died, the authority of his deputy clerk, (also the clerk of this court,) expired.

The appeal must, therefore, be dismissed, at the costs of the appellant.

MARTIN ET AL. *vs.* NALLY.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE FIFTH PRESIDING.

The plaintiffs obtained an injunction restraining the defendant from carrying on a bakery in wooden buildings adjacent to theirs, and in the midst of the town of Alexandria, on the allegation of imminent danger to their property, and a nuisance. The jury found twelve hundred dollars in damages for the defendant, on his plea in recon-

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vention for injury and loss sustained by the injunction, which this court refused to disturb.

Questions of fact, and the assessment of damages are peculiarly subjects for the consideration of a jury.

This suit commenced by injunction. The plaintiffs allege, that the defendant is a tenant of one of them, (Young and wife,) occupying a house and lot in the town of Alexandria, in which he has established a bakery, or wooden bake-house and oven, in the midst, and contiguous to their buildings. That from the combustible materials and construction of said bakery, and its contiguity to said buildings, there is daily and hourly danger of a conflagration of the bake-house and all the adjoining buildings, which would cause great injury and destruction of the property of the petitioners.

Martin, one of the plaintiffs, specially alleges, that he has leased the corner buildings from Young and wife, for five years, which adjoins the house and lot of defendant; and that he has erected new buildings thereon in lieu of the old ones, at an expense of four thousand dollars, and has a large stock of goods in store, and in consequence of the situation of this bakery, he has been unable to procure or effect insurance on his store-house and goods, without paying a much higher rate of insurance than usual. Thoms, also one of the plaintiffs, alleges he is the owner of a valuable store-house and lot adjoining the bake-house of Nally, and considers his property in imminent danger from the bake-house. The plaintiffs further allege, that they have complained of the danger of said bake-house to the said Nally in vain; and though amicably requested to remove the same, he still neglects and refuses to do so. They pray that said bakery be removed and abated as a nuisance, and that the defendant be cited and caused to remove the said bake-house, and that he and all others be restrained and inhibited from baking and using the same as a bakery, &c.

The defendant pleaded a general denial, except such parts of the petition as were specially admitted. He admits he occupies the premises as a bakery, on a lease from the plain-

tiffs, Young and wife, with the express understanding that he was to carry on his bakery there. He further avers, that he has been in the legitimate exercise of his legal rights in carrying on the baking business on the premises from 1831 to 1837, when he was arrested by an order of court, enjoining him from the further exercise thereof. That said order was procured without any legal or rightful cause, and has produced much damage to him, and continues to injure him in his business. He avers, that the conduct of the plaintiffs has been illegal, oppressive and malicious, and greatly to his injury. He prays that the injunction be dissolved, and that he have judgment over against the said plaintiffs in reconvention for two thousand dollars in damages, and that he be quieted in his occupation and premises.

Upon these pleadings and issues the cause was tried before the court and a jury.

The testimony was a little contradictory. The first witness for the plaintiffs deposed, that he saw the bakery a short time before issuing the injunction. The bake-house had been on fire, which had burnt through the weather-boarding. It was built on wooden sills, or sleepers, and he considered it, from the observations he made, to be dangerous. There was a covering of pickets about two feet from the top of the oven. The houses all around are all built of wood, and the kitchen of the defendant was within a few feet of the oven. The plaintiff, Martin's house, is about six feet from the oven. Witness thinks a fire originating in the bake-house would be very dangerous, and in all probability burn down the entire square. It is situated in a place of considerable business, near the centre of town.

Chew, agent of the insurance office, was examined; and says he considers this bakery very dangerous; that there are many places for bake-houses in the rear of town, where they might be carried on in safety. He charged Mr. Martin a half per cent. more insurance after he removed his store to the vicinity of this bakery.

The defendant showed that he had carried on a very profitable business before he was stopped. It also appeared

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he submitted his case and the condition of his buildings to the consideration of the trustees of the town, to know what kind of an oven he must construct, or what he should do to make it safer; but they never examined or acted upon it. Martin was anxious that the trustees should act, and order the bakery to cease.

Thoms withdrew from the suit.

From all the evidence adduced, the jury returned a verdict of twelve hundred dollars in damages for the defendant, and from judgment rendered thereon the plaintiffs appealed.

Dunbar, for the plaintiffs, strenuously contended that the bakery was shown to be highly dangerous to the safety of the plaintiffs and their property, and was a nuisance which ought to be abated. The defendant had been requested and entreated to remove his establishment out of the business part of the town to avoid the risk of burning down the houses where it was situated, but he still persisted in his course, until he was stopped by injunction.

2. The evidence, he insisted, fully sustained the plaintiffs, and the injunction ought to be perpetuated.

Elgee and *Hyams*, contra.

Martin, J., delivered the opinion of the court.

The plaintiffs, Martin, Young and wife, and Thoms, obtained an injunction inhibiting the defendant from baking in an oven built in a wooden house adjacent to those of the plaintiffs, on an allegation that the bake-house and oven were in such bad condition and so contiguous and near to the other wooden buildings, and being built of combustible materials, fire could not be made in the oven without imminent danger of a conflagration.

The defendant denied the allegations; prayed for the dissolution of the injunction, and claimed damages in reconvention.

The case was tried by a jury who returned a verdict for the defendant, and assessed his damages under the plea in

reconvention, in the sum of twelve hundred dollars. The injunction was dissolved, and the plaintiff, Thoms, having withdrawn from the suit, judgment was rendered against the others in conformity with the verdict, and they appealed.

The appellants urged, that in consequence of the danger resulting from the proximity of the bakery to their buildings and its ill and dangerous construction, they had a right to the relief which they sought; and they showed that one of them had not been able to effect the insurance of his house and goods without paying an excessive premium. The agent of the insurance office deposed, that he had required a premium of one half of one per cent. above that which is taken for the insurance of buildings, constructed of the same materials as those of the plaintiffs, which are considered as ordinary risks from their situation; not only on account of the vicinity of the bakery, but also in consequence of the houses being more crowded together, in that part of the town than elsewhere. It was shown that the defendant applied to the municipal authorities of the place, to examine his bakery, and designate any alteration which they might deem proper; and it does not appear that his application was ever acted on. The remainder of the evidence is desultory, and in some degree contradictory. The question of fact was peculiarly the subject for the consideration of a jury, and the assessment of damages still more so. A close attention to the evidence has led us to the conclusion that their verdict ought not to be disturbed.

Questions of fact, and the assessment of damages, are peculiarly subjects for the consideration of a jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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WILLIAMS *vs.* LANIER.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE FIFTH PRESIDING.

In a case involving facts only; and there being no positive evidence of the facts as alleged, this court refused to disturb a verdict in the negative.

This is an action in which the plaintiff alleges, that the defendant killed four of his mules, worth one hundred and fifty dollars each, and claims the sum of six hundred dollars as compensation for their value.

The defendant pleaded a general denial, and averred that the allegations in the petition were false.

The evidence showed, that the plaintiff and defendant's plantations joined, and that the mules and stock of the plaintiff were in the habit of breaking into the cornfield of the defendant, and committed such devastation, that he was frequently heard to exclaim that they *would eat him up*. About this period two of the plaintiff's mules were found dead in the defendant's field, caused by buck shot; and the other two shot in the same manner outside of the enclosure. There was, however, no positive evidence that the defendant either killed them himself or caused them to be killed. He was generally esteemed as a neighbor and good citizen. No previous quarrel had occurred, and the plaintiff had charged his overseer to keep his stock from molesting the defendant.

The cause was submitted to a jury, who, from the evidence before them, returned a verdict for the defendant, and from judgment rendered thereon the plaintiff appealed.

Dunbar, for the plaintiff, contended, that the evidence fully warranted the jury in giving the amount of the plaintiff's demand, as it proved or authorized the presumption that the defendant did kill the mules as alleged. He urged that this court should reverse the judgment, and give such a one as the evidence authorized, and assess the damages to which the plaintiff was entitled.

Elgee, for the defendant, urged the affirmance of the verdict and judgment.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment which refuses him the value of four of his mules, which he alleges were killed by the defendant.

The general issue was pleaded; and there was a verdict for the defendant.

The case presents no question of law, but turns entirely on that of fact. A close examination of the evidence, has left on us the impression that the verdict of the jury ought not to be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BALLARD ET AL. *vs.* LEE'S ADMINISTRATOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF CONCORDIA.

A *return* of service of petition and citation, which states that they were left with "W. F., a free white person over fourteen years of age, *residing at the defendant's domicil*," is insufficient. If he be absent, citation *must be left at defendant's usual place of domicil*, with a free person apparently above fourteen years of age, residing there.

If a judgment by default be taken before the defendant is in court by proper service of citation, although he be afterwards personally cited, final judgment cannot be entered without a judgment by default being again taken.

This is an action against the administrator of C. S. Lee's estate, on a bill of exchange, drawn by the deceased.

The sheriff made the following return of service of citation, &c.: "Served, on the 25th September, 1838, by leaving

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a copy of this citation and of the petition with William French, a free white person over fourteen years of age, *residing* at the defendant's domicil in this parish."

The defendant failed to appear, and a judgment by default was taken. Before proceeding to final judgment, the plaintiff filed an amended petition, praying to be allowed interest at the rate of eight per cent. instead of five per cent., &c. This amended petition, and a citation, was served on the defendant *personally*.

The defendant failed to appear, and put the case at issue, and a judgment by default was taken on the *amended petition only*. No answer having been filed to the original or amended petition, final judgment was entered *ex parte* for the plaintiff on both petitions for the whole amount demanded. From this judgment the defendant appealed.

Stacy and *Dunlap*, for the appellant, assigned various errors, as apparent on the record, on which they relied for a reversal of the judgment.

Barbour, contra.

Martin, J., delivered the opinion of the court.

The defendant and appellant has placed his case before us, on an assignment of errors, one of which only it becomes necessary to notice: to wit, the want of legal service of the original citation.

The sheriff's return states, "that he made service by leaving a copy of the citation and of the petition with William French, a free white person over fourteen years of age, *residing at the defendant's domicil* in this parish."

A return of service of petition and citation, which states that they were left with "W. F., a free white person over fourteen years of age, *residing at the defendant's domicil*," is insufficient. If he be

The Code of Practice, article 189, requires "that service must be made by leaving copies of the citation and petition *at the usual place of domicil* or residence of the defendant, if he be absent, by delivering them to a free person apparently above the age of fourteen, *living in* the house."

There is but one place of service, which is the domicil of the defendant. The service must be *made there*, and if it be made elsewhere it is bad. Nothing shows that French

received the papers from the sheriff *at the domicil* of the defendant. *Huntstock* vs. *His Creditors*, 10 *Louisiana Reports*, 488.

absent, *citation must be left at defendant's usual place of domicil*, with a free person apparently above fourteen years of age, residing there.

The plaintiff's counsel, however, has contended that this defect in the original citation is cured by the service of a copy of an amended petition, and a citation to answer thereto. The suit was brought on a bill of exchange. The original petition claimed the amount of the bill, and interest at the rate of five per cent. per annum, and ten per cent. damages. No answer having been filed, judgment by default was taken on the 7th of November, 1838. Afterwards, to wit, on the 12th February, 1839, the plaintiff, with leave of the court, filed an amended petition, in which he alleges, that the bill having been drawn in the state of Mississippi, he was entitled to interest at the rate of eight per cent., and prayed judgment accordingly.

A copy of this amended petition, and a citation to answer thereto, was duly served on the defendant in person. He filed no answer, and the 6th March following, judgment by default *was taken on the amended petition.*

On the 5th of April, 1839, a final judgment was rendered for the principal, interest, damages and costs, the motives of which are stated to be, the law and evidence being for the plaintiffs; "*and the judgment by default not having been set aside*, and the plaintiffs having proved their demand, it is ordered, &c."

If a judgment by default be taken before the defendant is in court by proper service of citation, although he be afterwards personally cited, final judgment cannot be entered without a judgment by default being again taken.

The first judgment by default having been taken while the defendant was not in court, was illegal, and must be considered as a nullity. The second, confined expressly to the amended petition, is the only one which could be legally made final. The court, in our opinion, erred in extending it to what was demanded in the original petition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; and that ours be for the defendant, as in case of non-suit, the plaintiffs and appellees paying costs in both courts.

PATTERSON *vs.* BONNER ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE FIFTH PRESIDING.

5 N.S. 50
9 R.R. 256

Where a judgment of a court of competent jurisdiction stands unappealed from and is final, it is conclusive on all the matters embraced in it: whatever may be the errors or injustice done by it, it forms *res judicata*, and cannot be re-examined.

In a sale with a defeasible condition (*vente à réméré*), it rests solely on the will of the vendor to dissolve the contract, and his expression of that will must have the same effect as the will of both parties in creating the contract.

So, where the vendor in a sale, with a defeasible condition, in the presence of two witnesses, offered to repay the price and redeem the property within the time limited, which was refused, and he made no consignment of the money: *Held*, that this was a sufficient notification to the vendee of the intention to redeem and preserve to the vendor his right of action to dissolve the contract after the term had elapsed.

Although the right of redemption is preserved to the vendor, of his intention and readiness to redeem, within the time limited, yet, without a consignment or tender of the money, he is not entitled to the fruits or profits.

In a *vente a réméré*, where the vendee has possession and enjoys the fruits or profits of the property, a stipulation to pay ten per cent. interest on redemption and repayment of the price, will be deemed illegal.

This is an action to recover twenty-four slaves *and their increase*, together with three thousand dollars a year hire, and five thousand dollars in damages, for their illegal detention by the defendant. Also, for an injunction to restrain the execution of a judgment which Mrs. Bonner had obtained against the plaintiff, and was proceeding to sell his property thereon.

The plaintiff shows that on the 18th March, 1825, he sold to the defendant, Mrs. Rosanna Bonner, twenty-four slaves, by notarial act, for the sum of seven thousand nine hundred and twenty-two dollars, for which he received her notes, payable by instalments; the last falling due the first of

March, 1828. The sale is absolute in its form, but there is a memorandum appended to it in the following words:

"It is agreed, that the said Thomas Patterson shall have the privilege of redeeming the negroes mentioned within, at any time within three years after the last instalment shall have been paid, by *repaying* the price, as expressed within, to the said Mrs. Rosanna Bonner, her heirs and assigns, with interest on the same at ten per cent. per annum from the time such payment shall have been made till such redemption shall take place. In testimony whereof the parties hereto subscribe their names, this 18th day of March, 1825.

"THOMAS PATTERSON,
"ROSANNA BONNER."

The plaintiff alleges, that it was expressly understood at the time of making this instrument that he was to retain possession, and have the services of said slaves, to enable him to pay the amount which would be due the defendant for their redemption. That he did remain in possession for nearly three years; and when the defendant obtained possession, she agreed that interest should not run on the sum he owed her. That the services of the negroes were worth more than the interest due.

He further states, that in February, 1834, he made the defendant a tender of the amount due her, and still tenders the same; and that he made a demand for the slaves in pursuance of their contract, and that she refused to receive the amount due her, and deliver the slaves, as she was bound to do; in consequence of which refusal he has suffered damage to the amount of five thousand dollars. That defendant has had possession of the negroes from the 14th February, 1828, until the present time, and that their services are worth three thousand dollars per annum, and have been worth this sum ever since she obtained possession, which amounts to eighteen thousand five hundred dollars.

He further states, that notwithstanding the premises, the defendant has issued an execution on a judgment she had against him for one thousand nine hundred and ninety-two dollars, and is proceeding to sell his property. He prays that

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the defendant be condemned to deliver up all of the said slaves *and their increase*, or their value, estimated at twenty thousand dollars. That in the alternative of delivering the negroes, that she be condemned to pay the sum of five thousand dollars in damages. He further prays, that she also be condemned to pay the sum of eighteen thousand five hundred dollars as the hire of said slaves, deducting the amount that may be due to her under their agreement. He prays for a writ of injunction to restrain the sheriff from proceeding on the execution against him, and for general relief.

The defendant excepted, and says, that the suit has been prematurely instituted, and should be dismissed.

She pleaded a general denial, and averred, that no legal tender or demand was ever made, and that no right of redemption ever existed, but if it ever did, the time within which it might have been claimed had expired before this suit was instituted.

She further says, the same matters have been adjudged between them in a former suit, the judgment in which is not appealed from, and which she pleads as *res judicata*.

She prays, that the injunction be dissolved, with interest and damages. But if the plaintiff receives the slaves, then she prays that he be condemned to pay her twenty thousand dollars, as a condition precedent, with ten per cent. per annum, the amount that will be justly due her.

Upon these pleadings and issues the cause was tried by a jury.

At the time of executing the sale, the 25th March, 1825, the slaves were allowed to remain in the possession of the vendor, and remained in his possession until December, 1827, when Mrs. Bonner recovered a judgment, decreeing her the possession, and one thousand and twenty dollars a year, from the 18th March, 1826, until the slaves were delivered to her, as damages occasioned by their detention, and that she have a writ of possession. The possession of the slaves was delivered in February, 1828.

William Justice sworn, says, that Mr. Patterson, after the sale of the slaves, kept possession of them upwards of two

years. An agreement was made between plaintiff and defendant, that the former was to put the negroes in controversy, in with those of the defendant, and draw a share of the crop in proportion to his force, and the debt he owed the defendant was to be paid in that way. This was in 1826, or 1827, while witness was overseer for defendant. The negroes were to work and the proceeds were to be placed to the plaintiff's credit until the debt was paid. The agreement was broken off because witness would not consent as the manager of defendant, to take charge of these negroes, &c.

R. W. Kay states, that in March, 1827, Patterson sent his negroes to witness's plantation, and he made a crop with them of fifty or sixty bales of cotton; that he and Patterson had contemplated working their hands together a series of years, and the proceeds of the crop to be applied principally to the payment of the debt Patterson owed to Mrs. Bonner. That the following winter the slaves were taken out of Patterson's possession.

J. B. Scott sworn, says, that two of the notes given by Mrs. Bonner to Patterson, were transferred to Judge Miller, and the last one to Madame Meullian. The last note was paid, one half in 1831, and the other half in 1832. Plaintiff's first wife was a daughter of Mrs. Bonner. Witness says, that prior to the payment of the last notes, he went to Mrs. Bonner to redeem the negroes in controversy, and proposed to pay her the first note; and pay her the amount plaintiff owed her, and release her from the two remaining notes. She said if Patterson would come and pay her the money himself, he could redeem the negroes, but that if any person was to be benefited by the transaction except Patterson, it might as well be her as any one else. This was after the sheriff had delivered her the possession of the negroes in 1828.

Witness says, on cross-examination, "he made no tender of the money to Mrs. Bonner, but was authorized to pay the amount of the debt due by Patterson, as acknowledged in the deed, and the amount she had paid on the first note, and restore the other two notes to her. In making the proposi-

tions to Mrs. Bonner, to redeem the negroes, witness proposed to place her in the same situation as she would have been in if she had paid no money on the notes, and pay her the money which Patterson owed her, as contained in the deed. So far as witness knows, Patterson knew nothing of the proposition to redeem at the time it was made. Witness had control of two of the notes at the time."

(The testimony of all these witnesses was excepted to; Scott's, because he was surety in the injunction bond, and Justice and Kay's, because parole evidence was alleged to be inadmissible to prove any thing under the contract.)

Burney, sworn, says, the negroes are valuable, and, from 1828 to 1832, were worth fifteen hundred dollars per year, and from that time to this, two thousand dollars. There are no better negroes in the parish; he would be willing to give thirty thousand dollars for them and their increase. He and William Brown went, with Patterson, the 24th of February, 1834, to Mrs. Bonner. Patterson told her he had come to pay her the money he owed her for the redemption of the negroes: she said, she could have nothing to do with it; that she had given up the business to her children, and any thing they would do she would be satisfied with. Patterson then applied to Mr. Bonner, the son, but they came to no conclusion. Brown testifies to the same facts in substance."

After the evidence was gone through, the judge charged the jury as follows:

"This is an action to redeem the slaves mentioned in the act of sale from Patterson to Bonner. That act, on the face of it, appears to be a sale of the slaves to Mrs. Bonner, and, by its effect, transfers the legal title to her; but a condition, or stipulation, is annexed to the sale, which gives to the plaintiff the right to redeem the slaves on refunding the money advanced to him, with interest, as therein mentioned, provided he did so within the time limited for that purpose. In order to entitle himself to redeem the slaves, the plaintiff, by the act, is bound to repay the price of the slaves, with ten per cent. interest at any time within three years from the

time the last payment should he made by her for the slaves. Has he made this payment within the time limited? If he has not made that payment, has he made a tender of payment, and demanded the return of the slaves within the time? If he has, he is still entitled to redeem the slaves. On this point, I am of opinion, that if the sum due was unsettled, and if he applied to the vendee and requested a settlement of accounts, and offered and declared himself ready to pay the balance due, and the vendee refused to settle, or to receive the money, this will be a good tender to preserve his right to redeem the slaves; and I think he will be entitled to their profits from that time. It is insisted by the plaintiff, that the sale, with the condition annexed, is nothing more than a security for the re-payment of the price of the slaves, with the interest thereon, and that, consequently, the plaintiff is entitled to the revenues of the slaves; but this point, it is insisted on the other side, has been decided by the former judgment of court between these parties, which is in evidence. That decision certainly gives to her the possession of the slaves, and also a right to the revenues, *i. e.*, to receive them as they accrued, but does not give her the absolute right to retain them finally to her own use; or only to receive them according to the terms of the contract. This the judgment does not decide, nor does it at all foreclose the plaintiff's right of redeeming the slaves. These points, therefore, remain open, and must be decided according to the terms of the contract: and this makes it necessary to consider the nature of the contract. On this a question arises which is important, and which is this: Was the vendee, Mrs. Bonner, after the passing of the conditional sale to her, entitled to the profits arising from the use and employment of them for her own benefit? or was the vendor, the plaintiff, entitled to these profits? This will depend on the nature of the act in question, and to ascertain this we must inquire what was the intention of the parties on passing the act; and for this purpose we must look into and consider the nature of the act itself. Was it, then, the intention of the party to transfer the right of property in the slaves to the vendee, or was it

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their intention that the conditional sale should stand only as a security for the repayment of the money which the vendee bound herself to pay for the plaintiff? If the former, then the vendee became entitled to the profits arising from the use of the slaves; if the latter, and the act was intended only as a security for the repayment of the money, then the plaintiff is entitled to the profits. This question you will decide on the evidence.

"I consider it clear, that, so long as the time limited for redeeming the slaves endures, the vendor has a right to redeem; and if he does redeem them, the conditional sale has no other effect than that of its being a security for the repayment of the money advanced to the vendor. If the vendor brings his suit to redeem within the time, the jury are bound to consider the sale as such security, and nothing more. What, then, is the amount which the vendor is bound to pay, on redeeming his property? If the vendee has had possession of the property, which yields fruits, and has enjoyed all the profits arising from the use of it, can she moreover claim the highest rate of interest allowed by law on the money advanced? I am clearly of opinion she cannot, for that would unquestionably be usurious. She is not entitled to both; but, in this case, she has stipulated for interest to be paid to her on the money she advanced. Has she not thereby herself decided this point, by prescribing the terms on which these slaves might be redeemed, to wit, on refunding to her the money, with ten per cent. interest. If, on the whole view of the case, the jury are convinced such was the intention of the parties at the time of entering into the contract, then the parties are bound by that stipulation; and, in that case, the defendant will be entitled to the money that was advanced to the plaintiff, with ten per cent. interest, and nothing more. If the profits arising from the use of the slaves amount to more, she must refund the overplus; if less, the plaintiff must make up that amount, in order to entitle himself to redeem."

To this charge the defendant's counsel excepted, and requested the judge to give the following, in charge to the jury:

"1. That this is a *vente à réméré*, and the jury must be governed by the articles of the Civil Code of 1808, in reference to such sales.

"2. That the defendant is entitled to the services of the slaves until the purchase money has been reimbursed, or tendered and consigned.

"3. That the reimbursement of the purchase money, or the tender and consignment thereof, is in the nature of a condition precedent, and must have been performed before the institution of this suit; otherwise there must be a verdict for the defendant.

"4. That the plaintiff, in order to maintain his action, must show an actual payment of the purchase money, or a lawful tender thereof, before the institution of this suit; and the jury are not authorized, in an action of this kind, to consider the purchase money as paid by the services of the slaves, which services, according to the law which must govern such cases as this, belongs to the vendee until the purchase money shall have been actually paid, or a lawful tender thereof made.

"5. That the judgment of the court in the case of Rosanna Bonner *vs.* Thomas Patterson is *res judicata* upon the question of the hire or services of the slaves, and that judgment having been pleaded in bar, settled this question in favor of the defendant in this case, and precluded the re-investigation thereof.

"6. That, in order to constitute a lawful tender, it must have been made to the vendee herself, or at her domicil, or to her agent, by the plaintiff or his agent, in the presence of two witnesses residing in the place, by tendering the purchase money, and exhibiting the same to her or her agent in the current coin of the United States, according to article 407 of the Code of Practice."

Each of these propositions were severally refused, by the judge presiding, to be given in charge to the jury, to which refusal the defendant's counsel took his bill of exceptions.

The jury returned the following verdict: "We, of the jury, find for the plaintiff the sum of six thousand four hun-

dred and nineteen dollars, which is the amount due said plaintiff, after deducting the amount of judgment and interest obtained by Mrs. Bonner against the plaintiff in 1827, together with all the said slaves that are living, and their increase, and costs of court."

After an unsuccessful motion by the defendant's counsel for a new trial, judgment was rendered confirming the verdict decreeing to the plaintiff the slaves, and giving him the sum of six thousand four hundred and nineteen dollars, as the net balance due him for their hire, and perpetuating the injunction staying the enforcement of the judgment, &c. From which the defendant appealed.

Elgee and *Dunbar*, for the plaintiff.

1. We contend, that although this is a sale absolute on the face of it, it in truth partakes of the nature of *a vente à réméré*, known to the French law as a *Contrat Pignoratif*, or pledge for the loan of money; usurious in its nature, and consequently null. See *Merlin, Questions de Droit; Contrat Pignoratif, page* 278 *et seq. Questions Faculté de Rachat, page* 108. 9 *Duranton*, 430.

2. The situation of the parties should be examined into. One was debtor, the other creditor. One was in urgent want of money, the other lent her name. The property was sold far below its value.

3. Every stipulation that the pledge shall belong to the creditor on failure of payment is *null*. The French Code and ours are the same on this point; and from this, Duranton deduces the illegality of the *Contrat Pignoratif*. See *Code Napoleon, articles* 2078, 2088. *Louisiana Code*, 3132, 3146.

4. If the object perished, the loss, Duranton says, would be the lenders. He sought to evade the law. 9 *Duranton, No.* 431.

5. This is not a contract of insurance. The security was very good, the best next to lands. Even lands may be destroyed by earthquakes, &c.

6. Parole evidence properly admitted to prove collateral facts; more especially when there is simulation in the

contract, as here. 7 *Louisiana Reports*, 331. *Louisiana Code*, 2267.

7. To allow the defendant ten per cent. interest, and the use or hire of the slaves, would be usurious; consequently, the contract would be null and void. 3 *Louisiana Reports*, 393. 4 *Martin*, 165. 4 *Kent's Commentaries*, 136. 1 *Vernon*, 476. *Pothier*, 416, 417. *Contrat de Vente*, 9 *Duranton*, *No.* 424. The fruits are the interest.

8. In a true *vente à réméré* both parties must be placed in the situation they occupied prior to the sale, *est potius distractus quam novus contractus. Pothier, Contrat de Vente*, 411. We show by calculation, that Mrs. Bonner would have received thirty-seven thousand dollars for the loan of eight thousand dollars, whilst Patterson would only receive his negroes.

9. No tender was necessary; we owed nothing, even if it was. *Pothier*, 410. *Paillett, on article* 1673. *Sirey, on articles* 1662 *and* 1673. *Troplong, pages* 374, 720. A mere verbal notification is all that is required.

10. The judgment of 1827, giving Mrs. Bonner the possession of the slaves is not *res judicata.* See 1 *Starkie, marginal note*, 224.

11. The hire of the negroes was fully equal to the annual amount of Mrs. Bonner's notes. The evidence proves this, and the plaintiff is fully entitled to the benefit of the hire of his slaves.

12. The peculiar circumstances of this case, shows that it was intended to cover a loan of money.

1st. Patterson was in distressed circumstances; moreover, he was the *debtor* of the defendant at the time of this contract.

2d. The price was far below the real value of the property. In the contract, it is stated at seven thousand nine hundred and twenty-two dollars, one thousand nine hundred and twenty-two dollars of which was in a debt due defendant by plaintiff. The balance was in notes, *without interest, payable at one, two and three years;* but it appears they were never paid until 1832, *seven years* after the contract. The negroes, in the evidence, are stated to have been worth, at the time of the sale, from *twelve* to *fifteen thousand dollars*.

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3d. The slaves, for nearly *three years*, remained in the possession of the vendor.

13. Will the parties be placed in the same position they occupied prior to the sale, if we give the defendant her principal sum and ten per cent. interest thereon, with the fruits and revenues of the slaves; and to the plaintiff, nothing but his negroes?

14. In 1825, Mrs. Bonner had not paid the sum of seven thousand nine hundred and twenty-two dollars; and at the same time Patterson possessed his negroes. In the year 1839, Mrs. Bonner will have received her principal, and eleven years interest thereon at ten per cent., with the hire of the negroes for eleven years, estimated at twenty-seven thousand five hundred dollars, according to the evidence, and nineteen hundred and forty-five dollars the amount of the judgment; making a total of forty-six thousand and seventy-nine dollars, for the loan of *her name* for six thousand dollars, whilst Patterson would only receive back his negroes. Thus, one party would be enriched at the expense of the other *forty thousand dollars*.

15. Defendants contend, that according to *Pothier, Contrat de Vente*, 413, they might validly stipulate for a higher price to be repaid by the vendor on his exercising his right of redemption. This is not correct. The stipulation here is to pay *interest*. No increase of the price was contemplated by the parties. Plaintiff was to repay the seven thousand nine hundred and twenty-two dollars, and ten per cent. interest thereon. Had the stipulation been, that he should repay ten thousand dollars on exercising his right, this would have been a *principal sum*, and the question might present some difference. *Troplong, No.* 696. 9 *Duranton, No.* 429.

Winn, for the defendant, argued the case; and submitted a written argument on the same side by *J. Seghers*, counsellor at law, who had been consulted.

For the defendant it was urged:

1. In this case, admitting the jury decided correctly on the evidence before them, and under the charge of the court, yet

the cause must be remanded on the bills of exception. All the parole evidence going to show the intention of the contracting parties, and what the contract is, was objected to as illegal and inadmissible. Bills of exception are also taken to the rejection of evidence; especially to the rejection of a letter from Patterson to Bonner. This letter made propositions, and showed how he understood the contract. It was rejected on the ground that it made propositions which were never accepted. But it contained declarations favorable to the defendant, and evidence against the plaintiff. Conversations of a party, while a compromise is going on, if they disclose facts, are evidence of those facts. 2 *Starkie*, 38, *note* (*g.*)

2. The testimony of Scott was illegal; he being the surety in the injunction bond. According to the act of 1831, section 3, the surety is to be considered a principal in the injunction, and bound *in solido* for the principal, interest and damages on its dissolution. He was, therefore, an incompetent witness.

3. Exceptions were taken to the charge of the judge to the jury, generally, and to his refusal to charge, as requested by the defendant's counsel.

Mr. Winn argued at much length to show the errors contained in the charge, and their tendency to mislead the jury; also, the error in refusing to charge them in the manner asked for. These were urged as strong grounds for setting aside the verdict, and remanding the case for a new trial.

4. The judgment in 1827, decreeing Mrs. Bonner the possession and use of the slaves in question, is relied on as *res judicata* in this case. This suit expressly claimed the ownership and revenues of the slaves under the act of sale in question. Patterson's answer, put at issue all the positions now relied on. This judgment is absolute, giving Mrs. Bonner the quiet and undisturbed possession and ownership of the slaves with their increase, and also a large sum for their back hire up to the time when possession was delivered. Hence we must conclude that the sale was not to secure the repayment of advances, and is not a mortgage. That the fruits and revenues were not to compensate the interest or

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principal, but are the irrevocable property of the defendant; and finally, as a corollary, that the acts in question constitute a *vente à réméré* and nothing more.

5. The charge of the judge, and the plaintiff's argument insists, that the stipulation of Patterson to pay ten per cent. interest, before redeeming, changed the character of the act, and that both the revenues and interest could not go to the defendant, or the contract would be usurious and void; but that it was the intention of the parties, that the defendant should have the *interest*, and the plaintiff the *revenues*. To this we oppose again the plea of *res judicata*. The judgment of 1827, forever settles and forecloses this question. It gives, irrevocably, the ownership, possession and revenues of the slaves and their increase to the defendant.

6. Such a contract, too, is permissible. *Pothier, Contrat de Vente, No.* 413, expressly says, that the purchaser may lawfully contract that the vendor shall pay a larger sum than he received, to enable him to redeem; although without this express contract, the returning the principal alone would be sufficient. The right to redeem is limited to a particular period, and the highest rate of interest might be charged, and added to the principal on redeeming. 5 *Merlin's Repertoire du Jurisprudence, verbo, Faculté de Rachat, page* 48, *No.* 8. *Sirey, Codes Annoté, page* 301, *note* 3, *on article* 1659 *Code Napoleon.*

7. The act of sale being *vente à réméré*, this suit is premature. The right of redemption is in the nature of an obligation, with a condition precedent, and the plaintiff must show performance on his part within the time stipulated; otherwise he cannot redeem; and that performance must be carried into effect before instituting suit. *Civil Code of* 1808, *page* 272, *articles* 68, 76. *Ibid.*, 364, *articles* 106, 107. *Ibid.*, 362, *articles* 93, 94. 3 *Martin, N. S.* 531. 7 *Ibid.*, 277. 4 *Kent's Commentaries*, 125.

8. There has been no payment or return of the price here, unless the fruits and revenues are to be considered as belonging to plaintiff, and as absorbing the debt. Neither has there been a tender. The only evidence touching this point

is that of two witnesses, (Burney and Brown,) which shows that none was, in fact, ever made, as required by law. *Code of Practice*, 404, 407, 418. *Louisiana Code*, 2163. 3 *Starkie*, 1390, *and note* (*u.*) *Ibid.*, 1393–4.

9. Not only a tender is necessary, but if not accepted, an actual consignment of the money must be made. If the money has not been tendered or consigned, it is now too late. The time fixed has expired. *Louisiana Code*, 2564. *Civil Code of* 1808, *page* 364, *article* 106. *Pothier, de Vente, No.* 410. 5 *Merlin's Repertoire, &c., verbo, Rachat, page* 48.

J. Seghers, considered this case as involving two inquiries:

1. What is the true character of the transaction, and is it not a valid sale with benefit of redemption?

2. Is not the right of the vendee to take the fruits *of the essence* of such a contract? and is not Madame Bonner entitled to the revenues of the slaves until the consideration is refunded, with interest? or the money tendered and consigned?

I. The Roman law is plain on these points. See *pacto de Retrovendendo, Digest, lib.* 19, *tit.* 5, *l.* 12. *Code, lib.* 4, *tit.* 54, *l.* 2. The Spanish law is in accordance. *Matienzo* says, that the *pact de Retrovendendo* may be inserted in the sale, or entered into soon afterwards, and that, in such case, the fine due the state can be exacted but once, there being in fact but one contract, which is a perfect sale, making the vendee the owner of the thing sold, and entitled to its fruits. "Where the sale is annulled by the *pact de Retrovendendo*, inserted, either in the sale itself, or made *soon after*, so that it may be considered as part of the contract, the fine is due for the first sale which was perfect, notwithstanding the *pact* be entered into in direct terms; and on account of that sale the vendee enjoys the fruits, and may sell and transfer to another person, but no other fine is due. A sale with that *pact* is true, absolute and perfect sale, since, by tradition, the vendee is the owner, and makes the fruits his own, *and is not bound to restore them to the vendor after redemption.* It is thereby proved that the sale is pure, and not conditional;

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otherwise, the vendee could not have the fruits." See *Matienzo, lib.* 5, *tit.* 11, *Law* 7, *gloss.* 3, *No.* 22, *and gloss.* 6, *No.* 42. *Code, lib.* 4, *tit.* 54, *law* 2.

Gomez says, "that if one buys with this *pact* that (if within a limited time the vendor repays the price, the vendee was bound to restore the thing,) then should the vendor pay, the purchaser will restore the object, and the sale will be avoided. But the vendee is not bound to give back the fruits gathered in the interval; but only those gathered after the payment, *or consignment of the money.*" This is in accordance with the common law, and in *forum conscientio.* The vendee enjoys the fruits, as having a good title. 2 *Gomez*, 415, *No.* 27 *and* 28. The text is plain in the *Code, lib.* 4, *tit.* 54. The ordinary glossary and all the commentators explain it so, as well as *Partida*, 5, *tit.* 2, *law* 42.

II. If any doubt could remain, our own laws are explicit on the subject. It is expressly stated, that when a vendor exercises the right of redemption, he becomes entitled to all the fruits not yet gathered, from the day he has either reimbursed or consigned the money paid by the purchaser, unless the contrary has been stipulated. *Louisiana Code*, 2564, 2545, 2551, 2553. *Civil Code of* 1808, *page* 363–4, *articles* 91, 97, 106. *Smoot* vs. *Baldwin*, 1 *Martin, N. S.*, 528.

1. The two next inquiries are, first, can the stipulation for the *ten* per cent. interest, change the character of the transaction, or make it other than a *vente à réméré*? or take from the defendant the right to the fruits; and can she not claim the interest and the fruits under the contract?

2. Should not the former judgment operate as *res judicata* as to the defendant's right of possession, and to take the revenues, and fix the character of this transaction as a valid *vente à réméré*?

I. *Pothier, Contrat de Vente, No.* 413, expressly says, that the purchaser may lawfully contract that the vendor shall pay *a larger sum* than he received, to enable him to redeem; although, without such express contract, no doubt that the returning of the principal alone would be sufficient. If a larger sum be stipulated for, there can be no good reason

why that larger price shall not consist of interest. The right to redeem expired at a limited period, and the interest could be easily calculated and added, so as to form a larger sum. See *Merlin's Repertoire, verbo Rachat. Sirey, Code Civil, annoté on art.* 1659. *Corarrubias*, a famous Spanish jurisconsult, says, "The seller may be bound by a private agreement to buy the thing by him sold, and for a larger price than he sold himself." See *Febrero, part* 1, *tom.* 2, *cap.* 10, *sec.* 1, *fol.* 377.

II. The plea of *res judicata* should prevail. All the points set up in this case are put at rest by the former judgment in 1827. The issue was on the same pleadings, and the proof required was identical. See 11 *Martin*, 607. 7 *Martin, N.S.*, 438. 2 *Johnson*, 210. 7 *Ibid*, 20. 8 *Ibid*, 34, 38. 10 *Ibid*, 365. 11 *Ibid*, 530.

III. Even should the stipulation to pay interest be deemed usurious, the contract would not be void; the interest alone would be lost. The laws of Spain, affixing a penalty for taking usurious interest, are repealed. *Hermann* vs. *Sprigg*, 3 *Martin, N.S.*, 190. 4 *Louisiana Reports*, 545.

1. The last inquiries are, can the plaintiff maintain an action without refunding the principal, or making a tender and consignment? And is any tender under our laws valid, unless the cash be exhibited?

2. Can this transaction be considered and held to be a mortgage or antichresis? or security in disguise for a usurious loan of money?

I. On the first of these points, the Spanish authorities already quoted are referred to. Our own statutory provisions are positive, that tender and consignment must be made. *Code of Practice*, 404 *to* 418, *and* 142, *et seq. Louisiana Code*, 2163, *et seq.* These authorities are positive, and support the affirmative of the question. Patterson's action was, therefore, premature, he not having made any legal tender and consignment.

II. On the last point urged, it is evident this transaction cannot be considered a mortgage. There is no principal debt to support or serve as a foundation for it. The proper

test is, in case of the death of the slaves, on whom does the loss fall? *Res perit domino.* 1 *Martin, N. S.*, 525.

It is not an antichresis, for it, like a mortgage, is but an accessory to a principal debt. It is not a pledge, for, by article 3119, of the Louisiana Code, it is essential to the contract of pledge that the creditor be put into the actual possession of the property pledged. It has been contended, that the *act of sale* under consideration was a *contrat Pignoratif.* This kind of contract was known in the old French jurisprudence, but has been disregarded in France since the revolution of 1789. It is to be hoped, that it will meet with no better reception in Louisiana. Its object was, to defeat loans on interest, under pretence of usury. See *Merlin's Repertoire, vol.* 9, *verbo Pignoratif:* also, *Questions du Droit,* 1 *vol., contrat Pignoratif.*

Hyams, also counsel for the defendant, argued against the demand set up in this action.

Strawbridge, J., delivered the opinion of the court.

The history of this suit, which has been one of much interest in the community where the parties resided, and of great excitement between themselves, is this: On the 18th of March, 1825, the plaintiff, by authentic act, passed before the judge of the parish, bargained and sold to the defendant twenty-four slaves, the consideration for which was seven thousand nine hundred and twenty-two dollars, payable "as follows: one thousand nine hundred and twenty-two dollars, in hand, being a debt which Patterson owed her, and which she releases and discharges; two thousand dollars on the 1st March, 1826; two thousand, 1st March, 1827; and the remaining two thousand, on the 1st March, 1828; for which said instalments the said Mrs. R. Bonner has given her three promissory notes, bearing even date with these presents, &c."

On the same paper is the following "Memorandum: It is agreed, that the said Thomas Patterson shall have the privilege of redeeming the negroes mentioned within, at any

time within three years after the last instalment mentioned within shall have been paid, by repaying the price, as expressed within, to the said Mrs. Rosanna Bonner, her heirs or assigns, with interest on the same at ten per cent. per annum from the time such payments shall have been made till such redemption shall take place."

On the 27th day of March, 1827, Mrs. Bonner instituted suit against Patterson, claiming from him the slaves, with their profits, they having remained in his possession, and requiring a sequestration, on the ground that she feared their removal from the state. Patterson contested this claim; the cause was tried, and judgment being rendered against him, in November, 1827, for the slaves and their profits, at the rate of one thousand and twenty dollars per annum, a writ of possession was issued, under which they were delivered to her on the 14th February, 1828.

On the 7th of February, 1834, a *fieri facias* issued on the judgment, for the sum of one thousand nine hundred and forty-five dollars, being the hire or profits of the slaves from 18th March, 1826, to 14th February, 1828, under which a tract of land was seized and advertised. Hereupon, Patterson commenced the present suit, in which he declares that this conveyance was made "to secure to her a certain sum of money;" "that it was expressly understood between them, at the time of making said instrument, that he was to have the services of said negroes, in order to enable him to pay the amount due her; and that, in pursuance of this understanding, they were left with him for nearly three years."

"That, after she thus obtained possession, it was agreed between them that interest should not run on the amount due her, and that the services of the slaves were more than equivalent to the interest;" "that he had made her a tender of the amount due her, which she refused to receive, or to deliver the slaves to him;" "that the services of the slaves were worth three thousand dollars per annum, which, in the six years and two months she held them, amounted to eighteen thousand and five hundred dollars, which is due him."

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He further sets forth, "that, under the judgment already spoken of (which he calls a pretended one, which the said Rosanna Bonner subsequently told him was not just and right, and that she would never claim it), execution has issued, against which he prayed an injunction, as also judgment for his eighteen thousand and five hundred dollars, after deducting the amount due to her under the agreement." The injunction was issued.

The defendant appeared, and, for answer, showed:

1st. That the suit has been prematurely commenced; that no legal tender or demand had been made.

2d. That the right of redemption never existed, but, if it had, the time for exercising it had passed.

3d. That the same matters and things had already been adjudged in the suit above referred to.

4th. A general denial, and prays dismissal of the injunction, with damages, &c.

The cause was tried by a jury, who found a verdict for plaintiff in the sum of three thousand six hundred and eighty dollars and fifty-one cents, and that he recover the slaves.

A new trial was granted, and a second jury found a verdict for the plaintiff for six thousand four hundred and nineteen dollars and thirty-six cents, and that he recover the slaves, on which verdict judgment was rendered, and this appeal has been taken.

The cause was heard at the last October term, but left undecided. Both parties now unite in desiring a final judgment, without remanding.

The conclusion we come to leaves out of view several questions which have been well argued at the bar; that conclusion is:

First, that the plea of *res judicata* must be sustained, as to so much of the plaintiff's petition as claims the contract to be a loan, and not a defeasible sale.

Secondly, as to so much as claims that the profits or fruits by them produced belong to Patterson, the plaintiff. A reference to the pleadings in that suit, detailed above, will show that these points, urged in the present suit as means of

attack, were, in the former suit, used as a means of defence. The issues in both were: Is the contract a loan, or a sale with condition? Are the profits or revenues arising from the labor of the slaves the property of Patterson, or of Mrs. Bonner? All the requisites to constitute a final judgment on these points are before us: the same persons, acting in the same character, the same thing, the same cause of action.

Admitting, then, on behalf of the plaintiff, that what the defendant denies to be put in issue by the pleadings really was so, and that what formed the subject of the principal discussion, *viz.* does the case present a *vente à réméré*, or the *contrat Pignoratif?* in other terms, a defeasible sale, or a feigned and usurious loan, is in issue in the present suit. Is not this matter settled by the judgment, which, under such pleadings, decreed to defendant the property in these slaves, according to her title, and the sum of one thousand and fifty dollars per annum, in lieu of the profits or use of the slaves.

If further proof be needed, the record furnishes it (for the whole proceedings and evidence are in proof in this case.) The defendant in that cause (plaintiff in this) propounded interrogatories to Mrs. Bonner, the first of which was, "Was it not agreed and understood between us, at the time of the sale, that they (the slaves) were to remain in my possession, and that I was to have the use and enjoyment of them?" to which she answered, "it was not so understood by her."

If, now, we proceed to decide that the slaves belong to him, and that he is entitled to their labor, will it not be in direct contradiction to the former judgment, not only unappealed from, but carried into execution more than ten years since. There must be some end to litigation: what suitors have once had the opportunity of settling, must, when decided, be final, or all rights of person and of property are afloat. It matters not how strong the case, how great the errors of the former decree were, or what may be our opinions concerning the rights of parties, if we could examine them. When the final decree of a court of competent jurisdiction, passing on the same matters, &c., is presented to us,

Where a judgment of a court of competent jurisdiction stands unappealed from and is final, it is conclusive on all the matters embraced in it: whatever may be the errors or injustice done by it, it forms *res judicata*, and cannot be re-examined.

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if we can open it, the very foundations of society are broken up, and endless, fruitless litigation is all that is left.

The next question to examine, is, whether this action can be sustained by the plaintiff, he having made no tender of the price, &c., before instituting suit. It is insisted on the part of the defendant, that to entitle the plaintiff to recover the property, it was essential he should have paid or consigned the price, whilst the plaintiff insists, that not even a tender was necessary; but that, if necessary, it has been made. On this subject the proof is, that on the 24th of February, 1834, (the last payment having been made in 1832,) the plaintiff, accompanied by two witnesses, waited on the defendant, and told her "that he had come to pay her the money he owed for the redemption of the negroes." She replied "she could have nothing to do with it; she had given up the business to her children, and any thing they would do she would be satisfied with." That defendant then turned to her son, (who was present,) and had the management of her affairs, and said to him, "I suppose you will make no other arrangement but the one we were talking of," who replied, "*No.*" That this was not a legal tender we do not doubt; but it is very questionable, whether it did not amount to a waiver of such a tender. This, however, we do not find necessary to decide.

The Code Napoleon has, so far as regards this question, the same provisions as our own. Under these, the better opinion, (as it appears to us,) is:

In a sale with a defeasible condition (*vente à réméré*), it rests solely on the will of the vendor to dissolve the contract, and his expression of that will must have the same effect as the will of both parties in creating the contract.

1. That as the defeasible condition rested solely with the vendor, the expression of his will to dissolve the contract must have the same effect as the will of both parties to create the contract.

2. That this need not be accompanied by "*les offres reel*," (a tender,) but that a mere verbal offer sufficed.

3. That such offer, made within the term allowed for redemption, preserved the right of redemption, and authorized the action after the expiration of the time. Troplong, *Contrat de Vente*, *No.* 718, *et seq.*, has treated this matter most ably, in a dissertation too long for insertion here:

Duranton, vol. 16, *Cours de Droit*, No. 403, approves of this construction, but limits the demand to one made in form to a "signification," "accompagnée d'offres même incompletes, même irregulières et faites dans le delai convenu etait une manifestation du vendeur d'exercer le réméré et avait en conséquence conservé son droit encore que ces offres n'eussent été services dans le mois ni dans le delai fixé d'une action en justice."

If we are to assume the opinions of these enlightened jurists, which are supported by decisions of the tribunals of France, we cannot avoid the conclusion that a sufficient notification of the plaintiff's intention to avail himself of the clause "*à réméré*," has been made, and that his action, even after the term of redemption, has been preserved.

But a very different result from that contended for by the plaintiff follows; though he thus preserves the right of redemption, the fruits or profits do not become his until the payment or consignment of the price. *Louisiana Code, article* 2564, corresponding to page 364, article 106 of the old Civil Code of 1808.

The ten per cent. interest on the loan cannot be allowed. The judgment pleaded in bar does not give it. In deciding the contract to be one of sale, and not of loan, it appears to have been impliedly settled, that no interest could be allowed. We have given the defendant the benefit of that judgment. This question of interest, had it been open, would have been a very awkward circumstance in adjudging this contract not to be a loan. We know of no law authorizing such a stipulation for interest.

The amount of the first judgment, it is necessary to say, forming neither part of the purchase money, expenses for repairs, costs of sale, or of improvements, stands on a different footing from the price, and cannot be connected with it and the restoration of the slaves.

We therefore order and decree, that the plaintiff recover from the defendants the slaves *named* in the petition, or such of them as survive, on paying to defendants the sum of

So, where the vendor in a sale, with a defeasible condition, in the presence of two witnesses, offered to repay the price and redeem the property within the time limited, which was refused, and he made no consignment of the money: *Held*, that this was a sufficient notification to the vendee of the intention to redeem and preserve to the vendor his right of action to dissolve the contract after the term had elapsed.

Although the right of redemption is preserved to the vendor of his intention and readiness to redeem, within the time limited, yet, without a consignment or tender of the money, he is not entitled to the fruits or profits.

In a *vente à réméré*, where the vendee has possession and enjoys the fruits or profits of the property, a stipulation to pay ten per cent. interest on redemption and repayment of the price, will be deemed illegal.

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($7922,) seven thousand nine hundred and twenty-two dollars.

That the injunction be dissolved, and that the plaintiff in injunction, together with his surety, John B. Scott, be condemned to pay the heirs of Rosanna Bonner ten per cent. interest, and ten per cent. damages on the sum of ($1945,) one thousand nine hundred and forty-five dollars, and that the said defendants, heirs of Rosanna Bonner, pay costs in both courts.

The following amendment was made to this judgment:

"On motion of *J. K. Elgee*, Esq., of counsel for the plaintiff, and by consent of *H. M. Hyams*, Esq., counsel for the defendant: It is ordered, that the judgment be amended by inserting the names of E. L. Briggs and Wm. H. Cureton as sureties in the injunction bond, in lieu of J. B. Scott; and that this order be entered as of the 18th (October) instant, the day on which said judgment was rendered, the motion having been made at the time of rendering the same."

Order on an application for a rehearing:

"On motion of *J. K. Elgee*, Esq., counsel for the plaintiff, a rehearing in this case is granted, so far as relates to the plaintiff's claim to the children born during the time the slaves were in possession of the defendant; but this order shall not prevent the execution of the judgment in these matters; and that in the delivery of said slaves, children under ten years of age shall not be separated from their mothers. But the plaintiff shall give security, at the discretion of the judge *a quo*, to produce such children, to answer the final decree; and that the rehearing as to the other parts of the decree be refused."